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IN THE

Supreme Court of the United States

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its affiliated LOCAL 6000,

Petitioners,

v.

DAVID FINK, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the respondent State officials violated the Fourth Amendment's ban on unreasonable searches by requiring a broad range of civil servants to submit to ongoing, random urine tests for unlawful drugs where there was no evidence of a drug problem among any segment of the employees to be tested and where none of the harms that the State asserted it wanted to minimize had ever occurred?

Whether the respondent State officials violated the Fourth Amendment's ban on unreasonable searches by requiring the same classifications of civil servants to submit to ongoing, random urine tests for alcohol, where there was no evidence that employees had worked while impaired by alcohol or that the normal methods of detection would be insufficient if employees did work while impaired by alcohol?

PARTIES

Petitioners are the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, and its affiliated Local 6000 (collectively referred to as the "UAW"). The UAW was the plaintiff in the district court and the appellant in the Sixth Circuit.

The respondents are officials of the State of Michigan who are sued in their official capacities. They are David Fink, the Director the Office of the State Employer; Janet Olszewski, the Director of the Department of Community Health; Patricia L. Caruso, the Director of the Department of Corrections; Thomas D. Watkins, Jr., the Superintendent of Public Instruction; and Major General Thomas G. Cutler, the Director of the Michigan Department of Military and Veterans Affairs.

The respondents Olszewski and Watkins were respondents in the Sixth Circuit. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure and Rule 35(3) of the Rules of this Court, as a result of changes in the officers of the State of Michigan, the respondent Fink has been substituted for Janine Winters, the respondent Caruso has been substituted for William Martin, and the respondent Cutler has been substituted for Major General G. Gordon Stump.

The respondents or their predecessors in office were defendants in the district court and appellees in the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

The UAW petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported at 385 F.3d 1003 (6th Cir. 2004). Apx. 1a. The decision of the United States District Court for the Western District of Michigan is reported at 336 F. Supp. 2d 686 (W.D.Mi 2003). Apx. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 2004. Apx. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND WORK RULE INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The State of Michigan drug and alcohol testing policy in question here is reproduced in the appendix. Apx. 36a.

STATEMENT OF THE CASE

A. Statement of Facts

The district court and the Sixth Circuit decided this case based upon an extended factual stipulation and declarations by the parties' respective expert witnesses.

In 1999, during the negotiations for a collective bargaining contract covering 20,000 professional and clerical employees of the State of Michigan, the respondents proposed mandatory urine testing for drugs and alcohol for six categories of employees.

The State did not make this proposal based upon any claim that there was an actually existing problem of drug abuse among the affected employees. In fact, as the Court of Appeals later found, there was "no evidence of a particularized or pervasive drug problem among the test-designated employees." Apx. 13a. In the 1990's, the State had never

accused a UAW-represented employee of delivering medical, counseling, or parole or probation services while impaired due to the use of drugs or alcohol. Nor had the State Department of Corrections, where many of the employees worked, accused a UAW-represented employee of attempting to smuggle drugs into a State correctional facility. Indeed, in the preceding decade, the Department had accused only one of the 2000 UAW represented employees in the Department of possessing drugs while on State property. Ct. Apx. Jt. Apx. 119, 112.[1]

Nor did the State propose the testing at issue here because its prior testing had revealed a latent problem that it wanted to abate. In the years before 1999, the State had conducted 39,000 drug tests, mostly under federally-mandated programs or in pre-employment screening. The 39,000 tests turned up 316 (.8 percent) positive results for marijuana and 67 (.17 percent) for cocaine, opiates, or amphetamines. Ct. App. Jt. Apx. 88, 91-92, 358-366, 383-389. There was no evidence that any of the persons who tested positive was impaired at work.[2]

Nor finally, did the State contend that existing sociological data as to any relevant group established that there was likely to be a drug problem among the affected employees. As Dr. John Morgan, an expert retained by the UAW, declared, the existing sociological data, including anonymous surveys by the National Institute of Drug Abuse, established that employed adults have one of the lowest rates of drug use in the population—with strong reason for believing that civil service professionals and clericals fell at the bottom of that already low spectrum. Ct. App. Jt. Apx. 213-214.

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[1] "Ct. App. Jt. Apx." refers to the Joint Appendix the parties submitted to the Sixth Circuit.

[2] The parties' experts agreed that the marijuana positives were, in the majority of cases, employees who had used marijuana occasionally in their off-duty time, with no discernible effect on work performance. Ct. App. Jt. Apx., 213-214, 1161.

As set forth in hearings in the State civil service system, which were made part of the record before the district court, the State insisted on the random testing not because of problems that had occurred but because state officials, led by a former Director of the State Department of Corrections, believed that problems *might* occur if employees worked in certain jobs while under the influence of drugs or alcohol. Specifically, the former Director, joined by a state medical administrator and an expert retained by state officials, testified that drug-impaired employees could cause accidents, could suffer security lapses, could deliver improper medical or psychological services, could be subject to blackmail, and could be candidates for importing drugs into the prisons (Ct. App. Jt. Apx. 1088-1104).

Solely on the basis of these asserted potential harms, the state Civil Service Commission approved the imposition of random drug and alcohol tests upon four broad categories of employees in the UAW bargaining units: [3]

> (2) A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.
>
> (3) A position in which the incumbent on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.

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[3] The Commission also imposed random tests upon Category (1), persons requiring a commercial driver's license; Category (6), persons who used hazardous or explosive materials; and Category (7), others agreed to in secondary negotiations. Apx. 37a-38a. As the UAW has never represented State employees who fell within Categories (1) and (6), those categories are not at issue in this petition. Nor is Category (7), since the parties have not agreed to add any other classifications. Nor finally are the reasonable suspicion, post-accident, follow-up, or preappointment aspects of the State's testing program at issue here. Apx. 38a-39a.

(4) A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.

(5) A position in which the incumbent has unsupervised access to controlled substances.

Apx. 2a-3a.

Following the Civil Service Commission's imposition of a contract containing those four categories, the State officials designated 2850 employees whom they claimed fell within one or more of these categories. As the UAW had always agreed that the State could test the approximately 400 probation and parole officers who had elected to carry firearms during the performance of their duties, that left approximately 2450 employees in dispute.

By stipulation, the UAW and the respondents agreed that six functional groups of employees fell within the categories designated for testing:

(1) Approximately 650 parole or probation officers who had elected not to carry a firearm during the performance of their duties, all of whom were designated for testing under Category Two of the State's program;

(2) Approximately 675 athletic coordinators, chaplains, librarians, teachers, counselors, recreation and music therapists, clericals, and similar classifications who delivered non-health care services within the state correctional facilities, all of whom were designated for testing under Category Three of the State's program;

(3) Approximately 450 nurses and occupational therapists who delivered medical services in the state correctional facilities, all of whom were designated for testing under Categories Two and Three of the State's program, and a few of whom were also designated for testing under Category 5 of the State's program;

(4) Approximately 175 psychiatrists, psychologists, social workers and similar employees who delivered mental health counseling in the state correctional facilities, all of whom were designated for testing under Categories Two and Three of the State's program;

(5) Approximately 225 physicians, nurses, dentists, occupational therapists and similar employees who delivered medical services in the State's institutions for the mentally ill and the developmentally disabled, all of whom were designated for testing under Category Three and a few of whom were also designated for testing under Category 5; and

(6) Approximately 200 psychiatrists, psychologists, mental health social workers and similar employees who delivered psychological services in the State's institutions for the mentally ill and the developmentally disabled, all of whom were designated for testing under Category Three and a few of whom were also designated for testing under Category 5.

The State began testing these employees on March 1, 2001. It took urine samples under the protocols promulgated by the United States Department of Health and Human Services. Both male and female employees were required to urinate with a monitor standing outside the stall, except in those cases where the monitor had reason to suspect that an individual might alter or substitute a specimen, in which case the monitor could directly observe the employee's urination Apx. 40a; HHS Guidelines Sec 2.2 (e) and (f)(9), Ct. App. Jt. Apx. 316-317.

The State program requires that no more than 15 percent of the employees provide samples each year for drug or alcohol testing. If an employee refuses to take a test, provides an adulterated sample, tests positive for any one of five unlawful drugs, or tests positive for alcohol above a specified level, the employee is subject to discipline up to and including discharge. Apx. 41a-42a.

During the period for which there is record evidence as to the results under this program, the State required 634 employees in the UAW units to submit to random drug testing and 488 to submit to random alcohol testing. Five employees tested positive for marijuana, three for cocaine, and four for alcohol above the specified level. Ct. App. Jt. Apx. 1025-1028. There was no evidence that any of these employees had worked while impaired.

The State, however, terminated all of those who tested positive for drugs and disciplined all of those who tested positive for alcohol.

B. The decisions of the district court and of the Sixth Circuit.

The UAW brought suit against the testing program in the United States District Court for the Western District of Michigan.

On the basis of the record described above, the district court granted the State's motion for summary judgment and upheld the random drug and alcohol testing of all of the employees at issue. The court did not analyze the specific nature of the claimed need for testing employees in any of the categories at issue—nor did it specifically analyze how the particular testing regime would address any aspect of those claimed special needs. Instead, the court summarily concluded:

> Here, it is clear that the State's justifications for random drug and alcohol testing are much more akin to those presented in *Von Raab* than *Chandler*. Although it cannot be said that all of the *Von Raab* justifying circumstances apply to any of the instant test-designated positions, some of them apply to each of the identified categories.
>
> Apx. 28a, citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) and *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

After conceding that there was no evidence of an existing drug problem, the district court held that the State need not wait until a substantial portion of the employees in question began using drugs before it was allowed to institute a testing program designed to deter drug use. Apx. 28a, citing *Board of Education v. Earls*, 536 U.S. 822, 836 (2002). The district court found that privacy interests were minimal and asserted, again summarily, that the "public safety concerns" implicated in this case were ". . . much stronger than both those presented and found wanting in *Chandler* and those presented and found sufficient in *Earls*." On that basis the district court approved the random drug testing program. Apx. 29a, 34a-35a.

The district court offered no separate analysis as to why the State's alcohol testing program was needed—and, in particular, it offered no reason for concluding that the normal methods for detecting the abuse of alcohol were insufficient.

The Sixth Circuit affirmed, adopting essentially the same reasoning and citing the same precedents as the district court. After acknowledging that "there [was] no evidence of a particularized or pervasive drug abuse problem among the test-designated employees," the Circuit held that it was "well-established that the existence of a pronounced drug problem is not an essential element to the finding of a special need" and that the "need to deter and prevent a substantial harm provides the necessary immediacy for the imposition of a testing program". Apx. 13a, citing *Earls*, 536 U.S. at 836 and *Von Raab*, 489 U.S. at 674-675. Like the district court, the Sixth Circuit set forth in summary form the "substantial harm" that it believed constituted a special need justifying the tests:

> It is certainly true that employees who either have 1) law enforcement duties, 2) direct and unsupervised contact with prisoners, 80 percent of whom have a history of drug abuse, or 3) a responsibility to deliver health care or psychological services to persons in state custody,

> would pose a significant threat to the health and safety of themselves and others if they use drugs or were under the influence of drugs while on duty.
>
> Apx. 14a.

Apart from this brief passage, the Sixth Circuit neither identified the factors creating the special need for the testing, nor analyzed how the particular testing program would address that special need. Like the district court, the Sixth Circuit offered no separate analysis as to the special need for the random testing for alcohol.

Having found a special need, the Sixth Circuit found that all of the employees in question worked in highly-regulated fields and thus had diminished expectations of privacy. The Sixth Circuit further found that the method of collecting the urine samples was less intrusive than the "negligible" interference with privacy found in this Court's decision in *Vernonia School Dist 47J v. Acton*, 515 U.S. 646 (1995). Apx. 15a. It concluded that the "unrelenting scrutiny" and repeated "unsettling shows of authority" inherent in a random and continuous program of testing did not change its calculus that the asserted benefits from the drug and alcohol-testing program outweighed the invasion of the employees' privacy. Apx. 15a. It therefore held that the program was lawful as to all of the employees that the State had identified for testing. Apx. 16a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS BY THE SUPREME COURT OF ARIZONA, BY A PANEL OF THE FIFTH CIRCUIT, AND BY OTHER COURTS ON THE CRUCIAL ISSUE OF WHEN THE GOVERNMENT MAY REQUIRE RANDOM DRUG TESTING BASED UPON AN ASSERTED SPECIAL NEED TO DETER HARMS THAT HAVE NOT BEEN SHOWN TO EXIST.

This case squarely presents the question of which public employees may be required as a condition of their employment to undergo random, ongoing urine drug testing on the sole basis of harms that public officials have asserted could occur as a result of the use of unlawful drugs—where there is no evidence that any of those harms has in fact occurred.

The importance of the question presented is self-evident. In place of the normal requirement for individualized suspicion, the Sixth Circuit has not only allowed the State to engage in random searches, it has allowed it to do so in circumstances where there is no evidence that the harms that State officials claim to envision have occurred or are at all likely to occur in the future.

The question presented concerns numerous clerical, professional and other public employees across the country. Employed adults have one of the lowest rates of drug usage in the population. Many, perhaps most, workplaces are like that of the State of Michigan—a very small minority of employees uses unlawful drugs; most of those use marijuana occasionally in their off-duty time; and the number of employees using "harder" drugs at any time is a fraction of one percent.

Yet even in these workplaces, where the incidence of on-the-job impairment is extremely low, it is not difficult for public officials—acting, in most cases, in good faith—to demand testing because they can envision harms that could hypothetically result if employees worked while impaired. If those envisioned harms are, in general, sufficient to justify the testing, there is a tendency for random testing to spread--and for larger numbers of innocent employees to be subjected to such tests, with the attendant invasion of privacy, resentment, and dilution of Fourth Amendment interests that necessarily follow.

The federal courts of appeals and the supreme courts of the various states are sharply divided over the circumstances in which the States may require random drug testing on the basis of harms that have not actually occurred.

The lower courts begin, of course, with the basic framework of analysis that this Court has established. Urine drug testing is a search, and, in the absence of individualized suspicion, the government may not subject employees to that search unless it establishes that the tests would further "special needs beyond the normal need for law enforcement" in a manner that outweighs the invasion of privacy caused by the particular program of testing at issue. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619 (1989); *Von Raab*, 489 U.S. at 665-666; *Vernonia,* 515 U.S. at 653; *Chandler*, 520 U.S. at 313; *Earls*, 536 U.S. at 829.

But if these precedents established the basic framework for analysis, they did not answer the question presented here. In every case save *Von Raab*, this Court found that a special need existed *only* when the government demonstrated that there was an existing drug problem among the targeted group that might be lessened by the particular testing regime that the government proposed. See *Skinner*, 489 U.S. at 607-608 (post-accident tests for railway employees); *Vernonia,* 515 U.S. at 649-650, 662-663 (ongoing random tests for high-

school athletes); *Earls*, 536U.S. at 834-835 (ongoing random tests for students participating in extracurricular activities).

Moreover, even in *Von Raab*, the Court held only that the government could require employees seeking a position as a Customs Agents to take a drug test at the time of their promotion based solely upon harms that could occur in the performance of that job as the result of the use of unlawful drugs. The majority certainly suggested that there were other employees who could be tested on this basis—but it did not define who those employees might be. *Von Raab*, 489 U.S. at 677-678.

Indeed, in *Von Raab*, this Court was sharply divided over precisely that question. Justices Scalia, Stevens, Brennan and Marshall declared that even Customs Agents should not be tested in the absence of evidence that there was an actually existing need for that testing. *Id,* 489 U.S. at 679-680 (Marshall and Brennan, JJ, dissenting), 683 (Scalia and Stevens, JJ, dissenting). In the view of these four dissenters, the government "perhaps" had the right to require such tests in the absence of an existing drug problem only if the "work-place at issue could produce such catastrophic social harm that no risk whatever is tolerable." *Id.*, at 684 (Scalia, J, dissenting).

As Justice Scalia's dissent forecast, in the wake of *Von Raab*, some public officials cited harms that could occur but had not occurred as justifications for imposing random tests upon wider categories of citizens. In *Chandler*, however, this Court halted that development by striking down a Georgia statute that required candidates for public office to take a drug test. The Court brushed aside Georgia's claim that harms could result from the use of unlawful drugs by public officials, declaring that "[n]othing in the record hints that the hazards respondents describe are real and not simply hypothetical." *Id.*, at 319. By a decisive majority, this Court declared that *Von Raab* was "hardly a decision opening broad

vistas for suspicionless searches," but was instead a decision that "must be read in its unique context" of the duties and dangers faced by the Customs Agents. *Id.*, at 321.[4]

In *Chandler*, the Court held that "a demonstrated problem of drug abuse" was not "necessary in all cases"—but other than by making clear that *Von Raab* should not be extended beyond the "unique context" in which it was decided, the Court did not define the category or categories of cases where such proof was not necessary.

Nor, finally, did the opinions in *Earls* define that category or categories. In that case, the Court approved a school district's plan to test students participating in extracurricular activities, despite the fact that the drug problem in the district in question was less than that that had existed in the Court's prior decisions. Both Justice Thomas and Justice Breyer explicitly premised their opinions on the high rate of drug use (and of hard drug use in particular) among young people in the Nation as a whole. *Earls,* 536 U.S. at 836 (Thomas, J) and 839 (Breyer, J). Both also explicitly premised their opinions on the well-established principle that "Fourth Amendment rights are different in the public schools than elsewhere" and both sustained the tests in question because they were not a condition for continued enrollment in the district and because conscientious objectors could opt out of the testing by not participating in extracurricular activities. *Id*, 536 U.S. at 829-830, 833 (Thomas, J); 536 U.S. at 841-842 (Breyer, J).

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[4] The Court held that "Customs employees, more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use." *Chandler*, 520 U.S. at 321 (internal citations and quotations omitted). Their primary mission was drug interdiction and they not only had access to "vast sources of valuable contraband" but had been "the targets of bribery by drug smugglers on numerous occasions." *Id.* (internal citations and quotations omitted).

Taken together, *Von Raab*, *Chandler*, and *Earls* do not define when public employers may impose one-time or, still less, ongoing tests as a condition of employment without evidence of a preexisting drug problem. In the absence of guidance from this Court, the lower courts have split badly on this issue.

Before the instant case, the Sixth Circuit held that the public schools could require a one-time drug test from all persons seeking to be hired, transferred or promoted into a teaching position even though it found that there was "little, if any evidence of a pronounced drug or alcohol abuse problem among [the district's] teachers or other professional employees." *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361, 374 (6th Cir. 1998), *cert. den.* 528 U.S. 812 (1999). In the instant case, the Sixth Circuit, acting under the claimed authority of *Von Raab* and *Earls*, vastly broadened *Knox County* by summarily holding that in the absence of any evidence of an existing drug problem, the State could require ongoing random tests from employees performing a broad range of duties under widely varying degrees of observation and supervision.

On the other hand, applying precisely the same precedents, the Supreme Court of Arizona held just months before that the City of Mesa had violated the Fourth Amendment rights of its firefighters by subjecting them to random, unannounced drug tests because "[t]he absence of evidence of drug use, at least as reflected in this record, provides no basis for us to conclude that random, suspicionless testing is calibrated to respond to any defined risk." *Peterson v. City of Mesa*, 207 Ariz. 35, 39, 83 P.2d 35, 39 (2004), *cert.den.* ___U.S. ___, 125 S.Ct. 51 (2004). The Court explicitly rejected the claim that the testing could be justified under *Von Raab*, finding that the firefighters' duties and supervision were unlike those of the Customs Agents. *Id.*, 207 Ariz. at 40, 83 P.3d at 40. It rejected as well the claim that the testing could be justified

under *Earls*, finding that firefighters "have little in common with students entrusted to the government's care." *Id.*

As firefighters face more danger than *all* of the employees at issue here—and less direct supervision and observation than *most* of the employees at issue here—the decision of the Sixth Circuit conflicts directly and obviously with the decision of the Supreme Court of Arizona.

In addition to the direct conflict between the Sixth Circuit and the Supreme Court of Arizona, the Fifth Circuit and Tenth Circuits are internally divided over the precise issue presented here. In its first decision on the scope of permissible testing in the absence of any evidence of a drug problem, the Fifth Circuit held that the public schools could not require tests from teachers involved in a work-related accident because there was no evidence of a "demonstrated reality" that established the need for such testing:

> As destructive as drugs are and as precious as are the charges of our teachers, special needs *must rest on demonstrated realities*. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use. . ."
>
> *United Teachers v. School Bd through Holmes*, 142 F.3d 853 (5th Cir.. 1998) (Wisdom), citing *Von Raab*, 489 U.S. at 681 (Scalia, J, dissenting).

In a later decision, however, a different panel of the Fifth Circuit held that the State could require ongoing random testing of teachers because of dangers that "could" occur if a teacher was using unlawful drugs. *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998). Judge Dennis strongly dissented from that holding because of the absence of any evidence that there was a significant drug abuse problem among the teachers. *Id.*, at 569-570 (Dennis, dissenting).

In striking down a program to test mechanics, a panel of the Tenth Circuit divided over the same issue. The panel unanimously struck down the particular testing program because it found that one-time tests would not deter drug use by mechanics. But only two judges found that the state had established the requisite special need without proving that a problem existed. *19 Solid Waste Department Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1075-1076 (10th Cir. 1998). Judge Briscoe strongly dissented from the panel majority's claim that the state could establish a special need for testing mechanics without producing evidence that there was an existing drug problem among the mechanics. *Id.*, at 1075-1076.

The decision by the Sixth Circuit in this case also conflicts directly with a decision by the Colorado Court of Appeals, where that Court, citing *Chandler*, held that *Von Raab* was a "singular case that uniquely justified departure from the general requirement that the government provide evidence of past drug use" in order to establish the requisite special need for testing. *Timm v. Reitz*, 39 P.3d 1252, 1258 (Colo. Ct. App 2001)(striking down plan to test dog trainers). Similarly, the Sixth Circuit decision conflicts in principle with a decision by the Ohio Supreme Court striking down a workers' compensation statute that encouraged employers to undertake drug testing, where the Ohio Supreme Court declared that this Court had held that random drug testing was constitutional only where the targeted group had "a demonstrated history of abuse," where the positions were "unique," or where the positions had the "potential for creating risks of catastrophe" if an employee were under the influence of a mind-altering substance. *State ex rel Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*, 97 Ohio St.3d 504, 512, 780 N.E.2d 981, 990 (2002).

Finally, in an exhaustive opinion striking down the random testing of police and firefighters under the Constitution of

Alaska, the Supreme Court of that State declared that it could not determine whether under *Chandler* and *Von Raab* the ongoing random testing of police and firefighters would violate the Fourth Amendment in the absence of any evidence of a drug problem among those employees. *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P 3d 547, 547 (Alaska Sup. Ct. 2001).[5]

As is apparent, there is a sharp split and great uncertainty over when the government may require random tests of its employees in the absence of any evidence of a preexisting drug problem—an uncertainty that the Sixth Circuit has deepened in this case by its expansive misreading of this Court's opinions in *Von Raab* and *Earls*. Apx. 13a-14a.

As first stated in Justice Scalia's dissent in *Von Raab*, the issue on which the lower courts have split is of crucial significance. If the government must, in general, demonstrate a concrete danger of drug abuse before instituting random testing, then the courts have a basis for judging whether a particular testing program is justified. On the other hand, if the government generally needs to show only that officials can envision ways in which a drug-impaired employee could cause harm, then there is no objective basis for judgment—and the door is opened to "men of zeal" intent, in the best of good faith, on eliminating every possible danger by subjecting ever widening circles of employees and citizens to random testing.

This Court has warned of precisely that danger.[6] To abate that danger the Court has directed the lower courts to

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[5] See also *Guiney v. Police Comm'r of Boston*, 411 Mass 328, 582 NE 2d 523 (1991) (striking down random tests of police and firefighters under state Constitution where no evidence of abuse shown).

[6] "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. . ." *Von Raab*, 489 U.S. at 687 (Scalia, J, dissenting), and *Chandler*, 520 U.S. at 322, (Ginsburg, J), citing *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J, dissenting).

"examin[e] closely" the proffered special need, with particular attention to whether the danger the State asserts actually exists. *Chandler*, 520 U.S. at 314, 319. Neither the circuit nor the district court did that.

This case presents an excellent record on which to abate the danger of the spread of drug testing based on merely hypothetical needs—and to resolve the split in the lower courts.

The record is undisputed—there is no evidence of a preexisting problem among the employees to be tested, nor is there such evidence for the employees in the UAW units, in the state workforce, or in civil service professionals and clericals generally.

Moreover, the record is broad. None of the employees at issue have duties remotely approaching those of Customs Agents.[7] And among the six groups of affected employees, the duties and degrees of supervision and observation vary widely, ranging from physicians to social workers in the state hospitals to nurses, teachers and chaplains in the State's prisons, to probation and parole officers who work in offices and in the field.

The record thus presents the Court with a clean, broad slate on which to draw the line where drug testing may be imposed upon public employees in the absence of any evidence that there is a drug problem among those employees.

The UAW asks that this Court grant its petition to assure that the same line is drawn in Michigan, Arizona and across the Nation The UAW further asks this Court to draw that line

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[7] The probation and parole officers are the only employees at issue who have duties that are remotely comparable to those of Customs Agents. By definition, however, they are not on the front line of the Nation's effort to stop the illegal importation of drugs, but are instead in the rear echelon of the State's effort to deal with a vast range of offenders whom the State has deemed safe enough to be at large in the community.

in a manner that ensures that civil servants working in offices or workplaces where there is no evidence that drug abuse is an actual problem are not compelled, absent extraordinary circumstances, to undergo repeated, ongoing searches based on nothing other than public officials' belief that a danger might hypothetically exist, where no danger whatsoever has been shown to exist in reality.

II. THE DECISION OF THE SIXTH CIRCUIT DIRECTLY CONFLICTS WITH A DECISION BY THE SUPREME COURT OF ARIZONA AND WITH DECISIONS BY THE NINTH AND DISTRICT OF COLUMBIA CIRCUIT COURTS ON THE ISSUE OF WHETHER ONGOING RANDOM DRUG TESTING OF EMPLOYEES REQUIRES A GREATER SHOWING OF SPECIAL NEED THAN ONE-TIME TESTING LIKE THAT APPROVED IN *VON RAAB*.

This case also squarely presents the question as to whether ongoing random tests of employees may be justified by the same evidence and analysis that the Court has used for one-time tests.

In *Von Raab*, of course, this Court approved only the one-time tests of Customs Agents at the time they were promoted. In approving those tests, the Court cited the one-time nature of the tests as "significantly minimiz[ing] the program's intrusion on privacy interests." Id., 489 U.S. at 672 n.2. As the Court held, employees were "notified in advance of the scheduled sample collection, thus reducing to a minimum any unsettling show of authority . . . that may be associated with unexpected intrusions upon privacy." *Von Raab*, 489 U.S. 672 n.2 (internal quotations and citations omitted).

Apart from this telling observation of the distinction between one-time and ongoing tests, this Court has not decided or even considered the standards that govern ongoing random

testing of public employees. The lower courts have split dramatically over that issue as well.

The Arizona and Alaska Supreme Courts found that there was a "qualitative," decisive difference between ongoing random testing and testing that occurred at the point of employment, promotion, transfer, or accident. Both supreme courts explicitly held that they would strike down ongoing testing on the basis of evidence that was sufficient to justify one-time tests. *Peterson,* 207 Ariz. at 35, 83 P.3d at 35, citing *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P 3d 547, 557 (2001).

Similarly, the Ninth and the District of Columbia Circuits—and the Sixth Circuit in *Knox*—found that the ongoing random nature of a drug testing program was a factor that weighed *against* its validity in ways that might be decisive in a particular case. *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989), *cert. den. sub. nom. Bell v. Thornburgh*, 493 US 1056 (1990); *Bluestein v. Skinner*, 908 F.2d 451, 456-457 (9th Cir. 1990), *cert. den.* 498 U.S. 1083 (1991); *Knox County*, 158 F.3d at 380.

But the Tenth Circuit reached a diametrically opposite conclusion. As described above, it struck down a program requiring mechanics to be tested when they obtained their commercial driver's license because the ". . . mechanic can easily evade detection merely by detoxifying his system prior to the tests." That is, it held that the one-time nature of the test was a factor that weighed against the program's validity. *19 Solid Waste Mechanics*, 156 F.3d at 1074.

In its most recent decision, the Sixth Circuit split the difference. After acknowledging that random, continuous testing was more intrusive, the Sixth Circuit held that the greater intrusion was "offset by the fact that such tests are also more efficacious than one time tests . . . at deter[ing] and prevent[ing] drug use to protect public safety and health."

Thus, it held, the fact that the tests "are conducted on a random and continuous basis does not change our calculus" in sustaining the drug testing program at issue. Apx. 15a.

The facts in all of these cases are substantially identical. But the Supreme Courts of Arizona and Alaska and three circuits have held that the absence of an ongoing random testing program is a decisive factor in approving drug testing; the Tenth Circuit has held that it is a decisive factor in rejecting drug testing; and, in its most recent decision, the Sixth Circuit has held that the ongoing nature of the program makes no difference at all.

As public officials and the citizens should know whether an ongoing component to the testing is a factor that weighs against the validity of the testing, for the validity of the testing, or one that makes no difference, this Court should grant review and establish the standards that govern the ongoing random testing of public employees.

III. THE SIXTH CIRCUIT IMPROPERLY APPROVED THE STATE'S RANDOM ALCOHOL TESTING PROGRAM.

Apart from the one-time, post-accident alcohol tests approved in *Skinner*, this Court has never considered whether the State may implement a random alcohol testing program.

At first glance, there is a substantial similarity between alcohol and drug testing in that both alcohol and unlawful drugs can clearly impair work performance. But there is, in fact, a decisive difference between the need for the two types of testing. The use of alcohol can be detected by sight, smell and sobriety tests—while the use of drugs cannot be detected by those methods.

Neither the district court nor the Sixth Circuit even considered this difference. It is important, not only in its own right, but for its general significance. From the beginning,

courts considering drug testing have rightly been concerned with the possibility of mission creep—that is, that testing for unlawful drugs could expand into testing for a variety of medical conditions and personal decisions that are none of the employer's business.

Before the lower courts, without analysis, approve the expansion of random, ongoing testing for drugs into random, ongoing testing for alcohol, this Court should establish the parameters for determining whether that expansion is warranted under the Fourth Amendment.

CONCLUSION

For the reasons stated, the petitioners request that this Court grant the writ of certiorari to the Sixth Circuit.

Respectfully submitted,

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January 19, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

No. 03-1574.

INTERNATIONAL UNION; United Automobile, Aerospace and Agricultural Implement Workers of America; Local 6000,
Plaintiffs-Appellants,

v.

JANINE WINTERS, et al., in their Official Capacities, Jointly and Severally,
Defendants-Appellees.

Argued: Aug. 5, 2004.
Decided and Filed: Sept. 30, 2004.

OPINION

Before: KENNEDY, SUTTON, and COOK, *Circuit Judges.*

KENNEDY, *Circuit Judge.*

The Plaintiffs, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its affiliated Local 6000 (hereinafter referred to collectively as "UAW"), appeal from the district court's judgment holding that a random drug testing program implemented for select Michigan civil service employees, including probation and parole officers, non-custodial employees in prisons, and medical personnel who deliver medical or psychological services to persons in state custody, does not

violate the Fourth Amendment. The district court reached this conclusion as it found that the state established sufficient "special needs," based upon substantial public safety concerns, which overrode the intrusion on the Fourth Amendment rights of the employees subject to the drug testing.[1] We agree with the district court's conclusion, and AFFIRM.

BACKGROUND

The UAW represents approximately 20,000 State of Michigan employees. Under the Michigan Constitution, the Michigan Civil Service Commission has the power to regulate the terms and conditions of employment for the State's civil service. On May 20, 1999, the Commission adopted a random drug and alcohol testing program, essentially borrowing protocols and procedures issued by the United States Department of Health and Human Services and Department of Transportation. The testing program was incorporated into the 1999-2001 Collective Bargaining Agreement between the UAW and the State of Michigan. Article 52 of the Agreement identifies seven categories of "test-designated positions" that are subject to testing. The UAW represents 2,855 employees who occupy test-designated positions, all in the following four categories:[2]

> Category 2: A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.

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[1] The parties submitted the matter to the district court for judgment based on stipulated facts and briefs in lieu of trial.

[2] Although the UAW criticizes the district court for not examining every "job," the district court did not need to evaluate each individual position because the UAW agreed to a stipulation that each of the 2,855 positions, occupied by employees it represents, requires duties, in varying amounts, within one or more of the four challenged categories. Indeed, the UAW made this stipulation and agreed to admit a representative sample of position descriptions. Thus, the UAW waived the argument concerning the need to evaluate each job description.

> Category 3: A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.
>
> Category 4: A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, and parolees.
>
> Category 5: A position in which the incumbent has unsupervised access to controlled substances.

The largest group of UAW represented employees now being tested consist of probation or parole officers and field service assistants. These employees are subject to testing either because they have law enforcement powers, are required or permitted to carry a firearm while on duty, or have regular unsupervised access to and direct contact with probationers or parolees. The UAW does not challenge the testing of those parole or probation officers who applied for and maintain their eligibility to carry firearms. Rather, it challenges the testing of those employees who are subject to testing only because they possess law enforcement powers or have access to and contact with probationers or parolees.

The next largest group subject to testing consists of non-custodial employees who work for the Department of Corrections or the Department of Community Health within the perimeter of the state's correctional facilities.[3] These employees are subject to testing because they have regular unsupervised access to and direct contact with prisoners.

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[3] These employees include Athletic and Program Coordinators, Chaplains, Prison Counselors, Recreational Therapists, Special Education Teachers, Dietician/Nutritionists, State Transitional Professionals, Employment Counselors, Communication Assistants, and General Office Assistants.

A third group of test-designated positions consists of Department of Corrections and Department of Community Health employees who provide health care and psychological care to prisoners. These positions include nurses, occupational therapists, psychologists and social workers.

Finally, a fourth group consists of Department of Community Health, Department of Education, and Department of Military and Veterans Affairs employees who provide health care and other services to residents at state hospitals for the mentally ill and developmentally disabled and to residents of veterans' homes. These positions include psychiatrists, psychologists, physicians, dentists, nurses, therapists, and social workers.

After the district court denied UAW's claim for declaratory and injunctive relief and awarded judgment for the State, this appeal followed. Since the issue in this case concerns the reasonableness of a Fourth Amendment search, we review the district court's decision de novo. *Knox County Education Ass'n v. Knox County Bd. of Education*, 158 F.3d 361, 371 (6th Cir.1998).

ANALYSIS

The Fourth Amendment to the United States Constitution protects "[t]he rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It is beyond dispute that government ordered collection and testing of urine samples effects a search within the meaning of the Fourth Amendment as such tests intrude upon reasonable expectations of privacy that society has long recognized as reasonable. *See Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Because these intrusions are searches under the Fourth Amendment, we must therefore

review the State's policy for reasonableness, "which is the touchstone of the constitutionality of a governmental search." *Board of Education v. Earls*, 536 U.S. 822, 828, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). The *Earls* Court noted that in "the criminal context, reasonableness usually requires a showing of probable cause." *Id.* However, the probable cause standard, the court further noted, "'is peculiarly related to criminal investigations' and may be unsuited to determining the reasonableness of administrative searches where the 'Government seeks to prevent the development of hazardous conditions.' " *Id.* (citing *Von Raab*, 489 U.S. at 667-68, 109 S.Ct. 1384). Thus, "in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Von Raab*, 489 U.S. at 668, 109 S.Ct. 1384. Therefore, the Court has recognized, a search unsupported by individualized suspicion may nonetheless be reasonable when the government alleges "special needs," beyond the normal need for law enforcement, that are both substantial—important enough to override the individual's privacy interest, and sufficiently vital to suppress the normal requirements of individualized suspicion. *Chandler v. Miller*, 520 U.S. 305, 318, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

In reviewing the reasonableness of a drug testing policy, the Court has instructed that we weigh the extent of the intrusion upon the privacy interest of the individuals being tested against the promotion of the government's proffered special need in conducting the tests. *Earls*, 536 U.S. at 830, 122 S.Ct. 2559. For instance, a program may be unconstitutional even if the intrusion upon the individual's privacy rights were minimal, if the government fails to establish a sufficient special need justifying the intrusion without individualized suspicion. *See e.g. Chandler*, 520 U.S. at 318-19, 117 S.Ct. 1295. A drug testing program may also be

unconstitutional, conversely, even if the government establishes a sufficient special need, if the intrusion upon the individual's privacy interest were excessive, for instance, because of an overly intrusive testing procedure. In deciding whether the State's testing program here was justified by a sufficient special need that outweighed the privacy interest of those being tested, it is helpful to briefly review precedent in this area to see how the Supreme Court and our court have balanced these competing interests.

In *Chandler*, the Court concluded that the state failed to proffer a special need that would overcome the general prohibition against suspicionless searches. 520 U.S. at 322, 117 S.Ct. 1295. The special need in *Chandler* failed because the state's interest was found to be merely symbolic, not special. *Id.* In *Chandler*, the State of Georgia required all candidates who sought to qualify for nomination or election to a state office to certify that they had tested negative for drugs. *Id.* at 309, 117 S.Ct. 1295. In defense of the policy, Georgia asserted that the use of drugs is incompatible with holding state office since the use of drugs calls into question an official's judgment and jeopardizes the discharge of public functions. *Id.* at 318-19, 117 S.Ct. 1295. Notably lacking from Georgia's defense, the Court noted, was any indication of a concrete danger that would arise by failing to test these candidates, thus demanding departure from the individualized suspicion requirement. *Id.* Rather, the court opined, since state officials are subject to day-to-day scrutiny, do not perform safety sensitive tasks, and are not alleged to have a drug problem, "[w]hat is left . . . is the image the State seeks to project." This need, the Court concluded, is symbolic, not special. *Id.* at 321-22, 117 S.Ct. 1295.

In *Von Raab*, by contrast, the Court found that the government not only offered a sufficient special need but also that the special need outweighed the intrusion upon the privacy rights of the employees subject to the testing. 489 U.S. at 677,

109 S.Ct. 1384. In that case, the Customs Service implemented a program that made drug tests a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm. *Id.* at 660, 109 S.Ct. 1384. The Court concluded that there was a sufficient special need to test these employees without individualized suspicion because their work involved drug interdiction; they were required to carry firearms; they could be subject to bribes or blackmail by the drug smugglers they were required to interdict; and they were not subject to the day-to-day scrutiny that is the norm in the more traditional office environment. *Id.* at 668-71, 674, 109 S.Ct. 1384.

In *Earls*, the Court concluded that a school may test students for drugs who participate in extracurricular activities since the school's 'special need' to "prevent and deter" the use of drugs by students, where the school is responsible for maintaining the discipline, health, and safety of those students, outweighs the student's limited privacy interest. 536 U.S. at 834, 836, 122 S.Ct. 2559. In reaching this conclusion, the Court first considered "the nature of the privacy interest allegedly compromised by the drug testing." *Id.* at 830, 122 S.Ct. 2559. The Court noted that a "student's privacy interest is limited in a public school environment." *Id.* The Court further noted that a student's expectation of privacy is even further diminished if the student participates in extracurricular activities, since such activities are typi cally heavily regulated. *Id.*; Cf. *Vernonia School Dist.* 47J v. *Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386, 132 L.Ed.2d 564 ("Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy"). After considering the nature of the privacy interest, the Court next considered the character of the intrusion imposed by the drug test. *Id.* at 832, 122 S.Ct. 2559. Under the policy, the Court noted, a faculty monitor waits outside a closed restroom stall for the

student to produce a sample. *Id.* The Court considered this method of collection to be at most a negligible intrusion upon the student's privacy interest. *Id.* Given the student's decreased expectation of privacy and the minimally intrusive nature of the procedure, the Court concluded that the invasion upon the student's privacy was not significant. *Id.* at 834, 122 S.Ct. 2559. Next, the Court considered the special need proffered by the state. *Id.* It concluded that, despite the absence of an "identifiable drug abuse problem among . . . [the students] subject to the testing," the need to prevent and deter the use of drugs among the students who participate in extracurricular activities to be sufficiently vital to suppress the requirements of individualized suspicion. *Id.* at 836, 122 S.Ct. 2559. Finally, the Court found the drug testing program to be constitutional as it concluded that the school's special need outweighed the minimal intrusion upon the student's privacy interest. *Id.* at 836-38, 122 S.Ct. 2559.

This Circuit has also had the opportunity to consider whether a proffered special need was sufficiently vital and substantial to permit drug testing of employees without individualized suspicion. In *Knox County*, a school board adopted a drug testing program that required the testing of employees who applied for, promoted to, or transferred to, safety sensitive positions, including teachers. 158 F.3d at 363. We concluded that the school board's proffered need to ensure the safety and security of the children under its care was sufficiently vital to overcome the traditional requirements of individualized suspicion. *Id.* at 374-79. After noting that teachers and other employees who work in a school have a diminished expectation of privacy because they work in a heavily regulated industry, we held that the school board's special need in ensuring the safety and security of the children under its care outweighed the intrusion upon the employees' privacy interest. *Id.* at 384.

With these cases as a guide, we now evaluate the special needs proffered by the State. In adopting the drug testing program, the Michigan Civil Service Commission followed the recommendations of the Employment Relations Board Impasse Panel.[4] In recommending that the Civil Service Commission adopt the drug testing program proposed by the State, the Panel stated as follows:

> Employees in "test-designated" positions who abuse alcohol and drugs represent a significantly greater threat to the health and safety of themselves and others than do employees in nontest-designated positions. Employees in "test-designated" positions may be required to react to unusual or dangerous circumstances. On balance, the Impasse Panel finds that . . . drug use by classified employees occupying "test-designated" positions can impair judgment and behavior so significantly that serious injury or death may result.

We cannot merely accept a state's invocation of special needs, but rather must engage in a context-specific inquiry, examining closely the interests advanced by the state. The largest group subject to testing consists of the parole or probation officers and field service assistants. They are subject to testing because they have law enforcement powers and because they have regular access to parolees or probationers. Probation and parole officers spend a significant amount of time supervising clients away from the office and away from supervision by their superiors. Moreover, they are often required to take urinalysis drug test samples from their clients in the field, over 20 percent of whom have tested positive for unlawful drug use. Since they are responsible for supervising

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[4] When the UAW and the State were unable to agree on a drug testing provision for the Collective Bargaining Agreement, a request was made for Impasse Panel assistance pursuant to the civil service rules governing collective bargaining. The Impasse Panel was composed of three members appointed by the Civil Service Commission.

probationers and paroles, public safety would be put in jeopardy, the state argues, if they performed this duty while under the influence of drugs or alcohol.

The second largest group consists of non-custodial employees who work in the perimeter of a correctional facility. The State contends that there is a special need to test these employees because they have unsupervised access to and direct contact with prisoners, 80 percent of whom have a history of drug and alcohol abuse. Moreover, the introduction of alcohol and drugs into correctional facilities, which prisoners could obtain possession of, presents a severe threat to security and to the safety of correctional employees and prisoners, since the use of drugs by prisoners can lead to disruptive behavior. In addition, employees who are involved in substance abuse may be vulnerable to influence by others who would bring drugs into the prison. And finally, employees under the influence of drugs or alcohol suffer from impaired judgment, which could adversely impact security within the facility as well as the safety of other employees and prisoners.

Another group of test-designated positions consists of employees who provide health care and psychological care to prisoners. As with the non-custodial employees, these employees have unsupervised access to and direct contact with prisoners, which raises the concern of the introduction of drugs or alcohol into a correctional facility, which would pose a severe threat to the security and safety of the employees and prisoners therein. In addition, these employees have access to medications, including controlled substances. Finally, if these employees were under the influence of drugs or alcohol, the health and safety of the patients these employees provided health care to could be put in jeopardy.

The final group subject to testing consists of those employees who provide health care to residents at state hospitals for the mentally ill and developmentally disabled and to

residents of veterans' homes. These employees have direct patient care responsibilities in state facilities and have access to medications, including controlled substances. An employee involved in substance abuse might succumb to the temptation to take wrongful advantage of his or her access to these controlled substances. As with the health care providers who provide care to prisoners, there is a risk of harm to the patient if a care giving employee is under the influence of drugs or alcohol.

The Plaintiff argues that the State's justification for the drug testing program does not arise to a "special need," permitting the testing of employees without individualized suspicion. It contends that, since there was no pre-existing drug problem among the employees here, the drug testing program may only constitute a "special need" if it fits under the criteria established in *Von Raab*, since in that case the Court upheld a drug testing program even though there was no pre-existing drug problem among the employees subject to testing. The Plaintiff notes that the *Chandler* Court identified four factors that it felt were decisive in determining that the customs agents in *Von Raab* could be tested even though there was no existing drug problem among them:

> 1) drug interdiction had become the Customs Bureau's primary enforcement mission; 2) the employees subject to testing had access to vast sources of contraband; 3) the agents had been targets of bribery; and 4) it was not feasible to subject the custom agents to day-to-day scrutiny. After noting these factors, the Plaintiff concludes that the State has failed to show a special need as these factors do not apply at all or only minimally apply to the test-designated categories.

The Plaintiff errs in arguing that, since there is no pervasive pre-existing drug problem among the test-designated employees, the drug testing program here may only be justified if it accords with the factors that justified the drug testing

program in *Von Raab*. We cannot, as the Plaintiff proposes, superimpose the four, context-specific factors outlined in *Von Raab* concerning customs agents onto the facts here, which involve jobs that lay in an entirely different context, to determine if the state has proffered a special need that is sufficiently vital to suppress the requirements of individualized suspicion. It is obvious that the specific factors outlined in *Von Raab* would not all or even mostly apply to another context since they were specifically distilled from the situation facing customs agents. If those factors were the test for determining whether a special need existed when there is no evidence of a pre-existing problem, then it would likely be difficult to find any special needs outside those faced by the Customs Bureau. Instead, we must consider the state civil service employees in this case who are subject to testing in their own unique context. *Knox*, 158 F.3d at 374 ("Just as the Customs agents in *Von Raab* must be considered in their own unique context, so too must the nature of the work and positions of school teachers and administrators be viewed as unique.")

Although in *Earls*, like *Von Raab*, there was no evidence of a particularized or pervasive drug problem among those subject to testing, the Plaintiff nonetheless contends that *Earls* does not support the constitutionality of the drug testing program at issue here. The Plaintiff argues, on the basis of *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)[5], that Justice Breyer's concurrence provides the Court's holding. In his concurrence, Justice Breyer emphasizes some underlying considerations to his conclu sion that no Fourth Amendment violation occurred in *Earls*. *Earls*, 536 U.S. at 838, 122 S.Ct. 2559. He noted that there is

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[5] The *Marks* Court noted: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest ground."

a documented national drug problem among high school students, that students could opt out of the drug testing program by not participating in extracurricular activities, and that the testing program was not disciplinary in nature. The Plaintiff argues that Earls does not support the imposition of the drug testing program because there is no evidence of a general drug problem among civil service employees, the employees may not opt out of the testing, and the testing may result in discipline.

The Plaintiff's argument fails, however, not only because it attempts to apply the context specific factors announced in *Earls* to the unique context presented in this case, but also because it mischaracterizes the Court's holding. *Marks* does not apply to *Earls* since Justice Breyer concurred in the Court's opinion, not merely in the judgment. Justice Thomas' opinion of the Court not only provides the holding but also supports the proposition that a state may have a special need to deter and prevent drug use among a specific group despite the absence of a particularized or pervasive drug problem among the group.

After considering the drug testing program in its own unique context, we conclude that the State has offered "special needs" that are sufficiently vital to overcome the traditional requirements of individualized suspicion. Although there is no evidence of a particularized or pervasive drug abuse problem among the test-designated employees, it is well established that the existence of a pronounced drug problem is not an essential element to the finding of a special need. *Knox*, 158 F.3d at 374; *See also Earls*, 536 U.S. at 835, 122 S.Ct. 2559; *Von Raab*, 489 U.S. at 674-75, 109 S.Ct. 1384. Rather, the need to deter and prevent a substantial harm provides the necessary immediacy for the imposition of a drug testing program. *Earls*, 536 U.S. at 836, 122 S.Ct. 2559. As the *Earls* Court noted, it would make little sense to require the test designated group to begin using drugs before the state

was allowed to institute a program designed to deter its use. *Id.* Moreover, unlike Chandler, in tne instant case there exists the potential for substantial harm that the state is entitled to attempt to prevent. It is certainly true that employees who either have 1) law enforcement duties, 2) direct and unsupervised contact with prisoners, 80 percent of whom have a history of drug abuse, or 3) a responsibility to deliver health care or psychological services to persons in state custody, would pose a significant potential threat to the health and safety of themselves and others if they use drugs or were under the influence of drugs while on duty.

Having concluded that the state has asserted sufficient special needs, based on substantial, and not merely hypothetical, public safety concerns, to justify the testing of employees without individualized suspicion, we next consider whether the State's interest in the drug testing outweighs the employees' reasonable expectations of privacy. It is well established that an individual who participates in a heavily regulated industry or activity has a diminished expectation of privacy. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 627, 109 S.Ct. 1402, 103 L.Ed.2d 639 (noting that railroad employees have a diminished expectation of privacy because they participate in a pervasively regulated industry); *See Vernonia*, 515 U.S. at 657, 115 S.Ct. 2386 (analogizing student-athletes to employees in closely regulated industry, who "have reason to expect intrusions upon normal rights and privileges, including privacy"); *See also, Earls*, 536 U.S. at 832, 122 S.Ct. 2559 (applying the same reasoning to students who participate in extracurricular activities); *Knox County*, 158 F.3d at 379 (finding that teachers' legitimate expectation of privacy is diminished by their participation in a heavily regulated industry). The employees who are subject to testing work either in law enforcement (parole and probation officers), the medical profession (nurses, occupational therapists, etc.), or inside a prison (teachers, chaplains, dieticians, etc.). It is certainly true that parole and probation officers, who are

charged with supervision of felony offenders, participate in a heavily regulated field. Similarly, those employees who provide healthcare and other services to prisoners and pa tients of state run facilities are also subject to comprehensive regulations.

Finally, employees who work within prisons obviously work in a highly regulated context. Therefore, since these employees work in highly regulated fields, we conclude that they have a diminished expectation of privacy.

Next, we consider the character of the intrusion. The degree of intrusion caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored." *Earls*, 536 U.S. at 832, 122 S.Ct. 2559 (quoting *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386). The procedure for collecting a urine sample under the drug testing policy at issue here requires that individual privacy be preserved unless there are grounds to suspect tampering. The policy provides that while the "specimen collector may be outside the bathroom or restroom in the near proximity, the employee closes (and locks, if he/she chooses) the door and has full privacy while urinating." This procedure is even less intrusive than the monitoring sustained in *Vernonia* as "negligible." *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386 (holding the intrusion to be "negligible" even though male students were required to produce samples at a urinal along a wall while observed from behind).

The Plaintiff argues, however, that since the drug tests are conducted on a random and continuous basis, rather than on the occurrence of a triggering event such as a promotion, the invasion of privacy is "qualitatively more intrusive" because the employees are subjected to "unrelenting scrutiny" and repeated "unsettling shows of authority." The fact that the drug tests are conducted on a random and continuous basis does not change our calculus that the drug testing program is not highly intrusive.

First, since only fifteen percent of the affected workforce is tested each year, an individual employee can expect to be tested only once every seven years on average. Moreover, to the extent the random and continuous drug tests are more intrusive, this is offset by the fact that such tests are also more efficacious than one time tests at achieving their intended result: to deter and prevent drug use to protect public safety and health. As the Court noted in Skinner[6], "[b]y ensuring that employees . . . will be tested [at a time] which no employee can predict with certainty, the [drug testing policy] significantly increase[s] the deterrent effect of the . . . penalties associated with the prohibited conduct." 489 U.S. at 630, 109 S.Ct. 1402.

Since we conclude that the State has offered sufficiently vital special needs, based on substantial public safety concerns, to overcome the traditional requirements of individualized suspicion, and that these special needs outweigh the employees diminished expectations of privacy, we AFFIRM the district court's holding that the program does not violate the Fourth Amendment to the United States Constitution.

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[6] Although the policy in *Skinner* provides that drug tests will be conducted upon the occurrence of an accident, since no one can predict with certainty the occurrence of an accident (unlike the timing of a decision to apply for a promotion), drug tests under the policy are therefore conducted randomly.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MICHIGAN
SOUTHERN DIVISION

No. 5:00-CV-21

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and Its Affiliated Local 6000,
Plaintiffs,

v.

JANINE WINTERS, JAMES HAVEMAN, WILLIAM S. OVERTON, THOMAS D. WATKINS, AND MAJOR GENERAL E. GORDON STUMP, in their Official Capacities, Jointly and Severally,
Defendants,

and

JOHN F. LOPEZ, in his Official Capacity,
Intervening Defendant.

April 7, 2003 *

OPINION OF THE COURT

McKEAGUE, *District Judge.*

This case presents a constitutional challenge to random drug and alcohol testing requirements imposed on many State of Michigan employees by the Michigan Civil Service Commission pursuant to a collective bargaining agreement.

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* Editor's Note: Opinion republished to include additional material. Page 693, fourth full paragraph, through page 696, second full paragraph.

Plaintiffs International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its affiliated Local 6000, hereinafter referred to collectively as "UAW," represent employees in the Department of Community Health, Department of Corrections, Department of Education, and Department of Military and Veterans Affairs, who are subject to these requirements. The first amended complaint contains four counts. By order dated March 30, 2001, the Court dismissed counts II and III and part of count IV. The UAW has subsequently withdrawn the remainder of the count IV claim, which was dismissed on July 11, 2002. The claim asserted in count I is the only claim remaining for adjudication.

Proceeding under 42 U.S.C. § 1983, the UAW asserts that random suspicionless drug and alcohol testing of its represented employees infringes their Fourth Amendment protection against unreasonable searches. Named as defendants are Janine Winters, Director of the Office of the State Employer; James Haveman, Director of the Department of Community Health; William S. Overton, Director of the Department of Corrections; and Thomas D. Watkins, Superintendent of Public Instruction for the Department of Education. John F. Lopez, State Personnel Director, was granted leave to intervene as a defendant in this matter. The UAW seeks declaratory relief and injunctive relief prohibiting enforcement of the drug and alcohol testing requirements.

The parties have submitted the matter to the Court for judgment based on stipulated facts and briefs in lieu of trial. Having heard oral arguments of counsel and duly considered the matter, the Court concludes, for the reasons that follow, that the UAW's claim must be denied and that defendants are entitled to judgment in their favor as a matter of law.

I

On May 20, 1999, the Civil Service Commission adopted the subject drug and alcohol testing program, essentially borrowing protocols and procedures issued by the United States Department of Health and Human Services and United States Department of Transportation. The testing program was incorporated into the 1999-2001 Collective Bargaining Agreement between the UAW and the State of Michigan. Article 52 of the Agreement identifies seven categories of "test-designated positions," which are subject to random selection basis drug and alcohol testing. The UAW represents 2,855 employees who occupy test-designated positions, all in the following four categories:

> Category 2: A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.
>
> Category 3: A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.
>
> Category 4: A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.
>
> Category 5: A position in which the incumbent has unsupervised access to controlled substances.

Of the 2,855 UAW-represented employees in the test-designated positions, 2,287 are in the Department of Corrections, 560 are in the Department of Community Health, seven are in the Department of Military and Veterans Affairs, and one is in the Department of Education. Employees in these test-designated positions may be required, as a condition of continued employment, to submit to an unannounced, random, suspicionless urinalysis drug test or breath-

alyzer alcohol test. The urinalysis test tests for evidence of the use of marijuana, cocaine, opiates, amphetamine/ methamphetamine and phencyclidine. Testing was commenced on March 1, 2000. Between March 1, 2000 and June 30, 2001, 507 UAW-represented employees were subject to random testing.

II

The UAW's Fourth Amendment claim is evaluated *with reference to the Supreme Court's ruling in Chandler* v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). In *Chandler*, the court recognized that drug testing of employees "intrudes upon expectations of privacy that society has long recognized as reasonable." *Id.* at 313, 117 S.Ct. 1295, quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Government ordered intrusions of this type are "searches" under the Fourth Amendment and must therefore be "reasonable" to pass constitutional muster. *Chandler*, 520 U.S. at 313, 117 S.Ct. 1295. Ordinarily, such searches must be based on individualized suspicion of wrongdoing to be reasonable. *Id.* However, particularized exceptions have been recognized based on "special needs, beyond the normal need of law enforcement." *Id.*, quoting *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402.

Although the case law speaks of a "closely guarded" class of suspicionless searches which must be justified by a "special need," recent decisions demonstrate that practically any proper governmental purpose other than law enforcement is sufficient to constitute a special need, triggering balancing between the governmental interests and the individual's privacy interests. See *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n. 17, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001).

In *Marchwinski v. Howard*, 309 F.3d 330, 332-34 (6th Cir. 2002), the Sixth Circuit collected recent "special needs" rulings:

> The Supreme Court has ruled that government has a special need to conduct drug testing in several different circumstances where no particularized suspicion is present: testing of employees of the Customs Service who apply for positions directly involving interdiction of illegal drugs or positions requiring the agent to carry firearms, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); testing of railroad employees involved in train accidents, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); testing of student athletes in an effort to prevent the spread of drugs among the student population, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); and testing of students who participate in competitive extracurricular activities, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). This circuit has held that a school district has a special need to test applicants for all safety-sensitive positions in a school district, *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir.1998); that a city has a special need to test its municipal bus drivers, *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475 (6th Cir.1991); and that a city has a special need to test its firemen and policemen, *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir.1990).

Defendants contend the drug and alcohol testing required under Article 52 of the Collective Bargaining Agreement is justified by such "special needs." Defendants argue that suspicionless random testing is authorized on a carefully

tailored basis only for test-designated positions, the duties of which pose significant health and safety concerns.

Yet, it is not for the Court to simply accept the State's invocation of a "special need." *Ferguson*, 532 U.S. at 81, 121 S.Ct. 1281. Rather, the Court must undertake a "close review" of the scheme at issue and "all available evidence," to determine whether the proffered special need is "substantial—important enough to override the individual's acknowledged privacy interests." *Chandler*, 520 U.S. at 318, 117 S.Ct. 1295. The Court "must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314, 117 S.Ct. 1295. *See also, Knox County Education Ass'n v. Knox County Bd. of Education*, 158 F.3d 361, 373 (6th Cir.1998).

A survey of recent decisions illustrates this interest balancing process. In Chandler, the Supreme Court struck down a Georgia statute requiring candidates for designated state offices to certify that they had taken a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the test result was negative. The court found that the state had failed to establish a special need to justify even this minimally intrusive search. In the absence of any evidence of a demonstrated problem of drug abuse among state office holders, the Chandler court concluded that the state's interest was primarily symbolic and therefore insufficient to outweigh individual privacy interests.

In Ferguson, too, the Supreme Court struck down a City of Charleston policy for lack of a showing of special need. The policy, allowing a hospital to subject pregnant patients' urine samples to drug testing without their knowledge and consent was deemed to serve primarily general law enforcement interests, even though the City asserted the beneficent purpose of protecting the health of both mother and child. That is, because of the dominance of the law enforcement

purpose, the asserted public safety concern was deemed to be secondary or even insignificant.

The Supreme Court's most recent ruling in this area is Board of Education of *Independent Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). In *Earls*, the court upheld random urinalysis drug testing of all high school students who participated in competitive extracurricular activities. The students' privacy interests were deemed to be overridden by the school district's interests in deterring and preventing drug abuse.

In the Sixth Circuit, there have been two recent rulings of interest. First, in *Knox County*, the Sixth Circuit upheld random drug testing of all persons applying for "safety sensitive" positions in a school system, including teaching positions. As to the government's special need, the court held that "a local school district has a strong and abiding interest in requiring that teachers and other school officials be drug free so that they can satisfy their statutory obligation to ensure the safety and welfare of the children." 158 F.3d at 379.

Finally, in *Marchwinski*, a unanimous panel of the court vacated a preliminary injunction issued by the district court, restraining enforcement of a statute conditioning eligibility for Family Independence Program benefits on the applicant's submission to random substance abuse testing. Whereas the district court concluded that the state had not identified a sufficient special need, the Sixth Circuit disagreed, finding that "the evidence in the case at hand establishes that Michigan's special need does encompass public safety concerns, as well as other needs 'beyond the normal need for law enforcement.'" 309 F.3d at 335. Among the public safety concerns said to be sufficiently supported in the record were concerns that substance abuse by parents contributes substantially to child abuse and neglect, and that crime associated

with illicit drug use and trafficking creates a public safety risk. *Id.* at 336. On January 21, 2003, however, the Marchwinski decision was vacated, as the Sixth Circuit submitted the case for en banc review. *Marchwinski v. Howard*, 319 F.3d 258 (6th Cir.2003). The en banc ruling has not yet issued.

III

Against this backdrop, the Court considers defendants' asserted special needs. Defendants contend the identification of test-designated positions was the result of a rigorous process designed to include only those positions that directly implicate public safety concerns. In adopting the random testing program embodied in Article 52, the Civil Service Commission followed the recommendation of the Employment Relations Board Impasse Panel. The Impasse Panel summarized the rationale for its recommendation as follows:

> The "test-designated" positions will be the only positions subject to random drug and alcohol testing. The Impasse Panel is persuaded that each of the categories of "test-designated" positions proposed by the OSE [Office of the State Employer] represents a legitimate and important concern for on-duty alcohol and drug abuse. Employees in "test-designated" positions who abuse alcohol and drugs represent a significantly greater threat to the health and safety of themselves and others than do employees in nontest-designated positions. Employees in "test-designated" positions may be required to react to unusual or dangerous circumstances. Also, the consequences of an error in judgment or performance arising out of drug or alcohol abuse are substantially greater for "test-designated" employees than for nontest-designated employees.
>
> On balance, the Impasse Panel finds that the governmental interest in the safety and security of employees,

> state institutions, and citizens outweighs the privacy concerns of the state employees in these "test-designated" positions. The Impasse Panel finds that alcohol and illegal drug use by classified employees occupying "test-designated" positions can impair judgment and behavior so significantly that serious injury or death may result. In light of these risks, the Impasse Panel believes that the state is permitted to engage in suspicionless drug and aicohol testing without violating the constitutional rights of the employees.

Stip. Ex. 21, p. 11.

The largest group of employees subject to testing consists of 1,132 parole and probation officers and 25 field service assistants. They are subject to testing because they have law enforcement powers or use firearms and because they have regular access to parolees or probationers. The UAW concedes that the requisite special need is established with respect to those parole and probation officers who are actually authorized to carry a firearm. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). As to the remainder of these positions, defendants rely heavily on the testimony of the former Director of the Department of Corrections, Kenneth McGinnis, before the Impasse Panel.

Director McGinnis testified that probation and parole officers spend a significant amount of time supervising clients away from the office and away from supervision by their superiors; that they have arrest powers and are charged with making safety and security decisions that demand alertness; that they are often required to take urinalysis drug test samples from their clients in the field, over 20 percent of whom have tested positive for unlawful drug use; and that the effectiveness of parole and probation officers would be compromised if they were under the influence of drugs or alcohol, jeopardizing public safety.

The second largest group of employees subject to testing consists of non-custodial employees in the Departments of Corrections and Community Health who work in the perimeter of a correctional facility, e.g., program coordinators, chaplains, counselors, therapists, teachers and dietician/ nutritionists. Again relying on Director McGinnis' testimony, defendants contend that these employees have unsupervised access to and direct contact with prisoners, 80 percent of whom have a history of drug and alcohol abuse; that the introduction of alcohol and drugs into correctional facilities presents a severe threat to security within the facility and to the safety of correctional employees and prisoners; that employees have been involved in introducing drugs into the prisons; that employees who are involved in substance abuse may be vulnerable to influence by others who would bring drugs into the prisons; and that employees under the influence of drugs or alcohol suffer from impaired judgment, which could adversely impact security within the facility as well as the safety of other employees and prisoners.

Another group of test-designated positions consists of Department of Corrections and Department of Community Health employees who provide health care and psychological care to prisoners, e.g., nurses, occupational therapists, psychologists and social workers. These employees, the record shows, have both unsupervised contact with prisoners and access to medications, including controlled substances. Employees in this group, too, who are under the influence of drugs or alcohol while working or who are involved in substance abuse, defendants contend, may also suffer from impaired judgment, compromising facility security as well as the health and safety of other employees and prisoners.

Finally, a fourth group consists of Department of Community Health, Department of Education, and Department of Military and Veterans Affairs employees who provide health care and other services to residents at state hospitals for the

mentally ill and developmentally disabled and to residents of veterans' homes, e.g., psychiatrists, psychologists, physicians, dentists, nurses, therapists and social workers. These employees have direct patient care responsibilities in state facilities and have access to medications, including controlled substances. Defendants contend these circumstances justify random testing because of (1) the risk of harm to vulnerable patients if a care-giving employee is under the influence; and (2) the risk that an employee involved in substance abuse might succumb to the temptation to take wrongful advantage of his or her access to controlled substances.

Defendants also contend their asserted special needs have nothing to do with law enforcement. The record demonstrates that drug and alcohol test results are kept confidential and are used exclusively for discipline in the workplace, as appropriate.

The UAW challenges the sufficiency of the asserted special needs primarily on the basis that they are hypothetical only. The UAW insists there is no demonstrated history of drug abuse among state employees in the test-designated positions. Absent such a showing, the UAW maintains, the exceptional circumstances necessary to avoid the Fourth Amendment's normal requirement of individualized suspicion are not established. See *Chandler*, 520 U.S. at 318-19, 117 S.Ct. 1295.

The Supreme Court recognized in Chandler that a demonstrated problem of drug abuse, although helpful to substantiate a special need, is not necessary in all cases. *Id.* at 319, 117 S.Ct. 1295. The court noted that in Von Raab, random drug testing of Customs Service employees was sustained despite the absence of a documented drug abuse problem among Service employees. *Id.* at 320, 117 S.Ct. 1295. The Court went on to identify the following circumstances that nonetheless justified the *Von Raab* drug testing program: (1) that drug interdiction had become the agency's primary enforcement mission; (2) that employees subject to

testing had access to vast sources of valuable contraband; (3) that Customs officers had been the targets of bribery by drug smugglers on numerous occasions and several had succumbed to the temptation; and (4) that it was not feasible to subject Customs officers to the kind of day-to-day scrutiny that is the norm in more traditional office environments. *Id.* at 321, 117 S.Ct. 1295.

In contrast, the Chandler court held the Georgia requirement that candidates for public office submit to a single pre-election urinalysis test on a date of their choosing was symbolic only. Because public safety was not genuinely implicated, the Fourth Amendment was held to preclude such suspicionless searches.

Here, it is clear that the State's justifications for random drug and alcohol testing are much more akin to those presented in *Van Raab* than Chandler. Although it cannot be said that all of the *Von Raab* justifying circumstances apply to any of the instant test-designated positions, some of them apply to each of the identified categories.

In *Earls*, moreover, the Supreme Court again recognized, in the public school context, that evidence of a particularized or pervasive drug problem is not essential. 122 S.Ct. at 2568. See also, *Knox County*, 158 F.3d at 374 ("[T]he existence of a pronounced drug problems is not a sine qua non for a constitutional suspicionless drug testing program."). The Court took notice that "drug abuse is one of the most serious problems confronting our society today." *Id.*, quoting *Von Raab*, 489 U.S. at 674, 109 S.Ct. 1384. The Earls court observed that "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." 122 S.Ct. at 2568. See also, *Knox County*, 158 F.3d at 379 ("We do not believe that the Board must wait passively for a disaster to occur before taking preemptive action to minimize the risks of such an

occurrence."). Further, the public safety concerns implicated by the instant drug and alcohol testing programs are much stronger than both those presented and found wanting in Chandler and those presented and found sufficient in Earls.

The UAW protests, contending there is no empirical evidence to support the assumption that random testing is an effective deterrent of unlawful drug use or misuse of alcohol. The efficacy of the challenged drug testing program is a factor to be considered in evaluating the sufficiency of the asserted special needs. See *Earls*, 122 S.Ct. at 2567. In Earls, the court summarily concluded that testing students who participated in extracurricular activities was a reasonably effective means of addressing the school district's legitimate safety concerns in preventing, deterring and detecting drug use. *Id.* at 2569.

This general conclusion is supported, moreover, in the present record by the testimony of Director McGinnis, who observed that drug testing of the inmate population since the 1980's has been followed by "a pretty significant drop in the number of positives."

Stip. Ex. 9, p. 59. Also supporting the conclusion that random drug testing is an effective deterrent is the report of Donald Ian Macdonald, M.D., former Director of the White House Drug Abuse Policy Office under President Ronald W. Reagan. Dr. Macdonald evaluated the Michigan testing program in light of the UAW's challenge and issued an 18-page report on March 18, 2002. He examined the "Quest Index," reflecting workplace drug testing positive rates, from 1987 to 2001, and interpreted the 74 percent decline in positive rates as "a definite sign that the program is working." Macdonald Report, pp. 4-5. Dr. Macdonald further observed:

> Michigan has adopted the federal rules and followed its recommendations for pre-employment testing, random unannounced testing, probable cause testing, post acci-

dent testing, and return-to-work testing. All of these make sense.

. . . . .

Random unannounced testing, could potentially be the most useful. The knowledge of the possibility that unannounced testing may occur at any time can be a strong deterrent to drug use. If performed often enough random tests should act as a strong incentive to avoid drug use for the worker who wants his job and knows that a failed test will have negative consequences.

Id. at p. 6.

The Court is thus satisfied that the efficacy of the challenged drug and alcohol testing program has been adequately established. The Court is also satisfied that defendants have asserted sufficient "special needs," based on substantial, and not merely hypothetical, public safety concerns, to facially justify the random testing of employees in the test-designated positions.

IV

Defendants having thus met the requisite "special need" threshold, it remains to be determined whether the State's interests outweigh individual employees' reasonable expectations of privacy. Defendants maintain they have endeavored to respect employees' privacy rights as much as possible by limiting test-designated positions to safety sensitive positions. Moreover, because of the safety and health concerns implicated, employees in test-designated positions are said to work in heavily regulated fields of employment, in which they necessarily have diminished expectations of privacy.

In Skinner, railroad employees were deemed to have diminished expectations of privacy because they participate in an industry pervasively regulated to ensure safety. 489

U.S. at 627, 109 S.Ct. 1402. In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), student-athletes were deemed to be analogous to employees in a closely regulated industry, who "have reason to expect intrusions upon normal rights and privileges, including privacy." See also, *Earls*, 122 S.Ct. at 2566 (applying the same reasoning to students who participate in extracurricular activities). In *Knox County*, the Sixth Circuit held that public school teachers participate in a heavily regulated industry and therefore have diminished expectations of privacy. 158 F.3d at 383-84.

In comparison with the above examples, it can hardly be denied that employees in the test-designated positions clearly participate in heavily regulated industries. Department of Corrections employees charged with supervision of felony offenders, parolees and probationers, certainly participate in a heavily regulated field. Similarly, healthcare and other professional providers of services to prisoners, patients and other residents of state facilities are also subject to comprehensive regulations. Indeed, the UAW does not seriously contest the proposition that employees in test-designated positions have diminished expectations of privacy.

The UAW maintains, however, that such employees are still protected by the Fourth Amendment. The UAW cites authorities from three federal circuits holding that even persons as highly regulated as prison employees cannot be subject to strip searches without reasonable suspicion.

This argument calls into question the character of the required intrusion upon privacy rights. The degree of intrusion caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored." *Earls*, 122 S.Ct. at 2566, quoting *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386. Defendants contend their testing program is designed to be minimally intrusive. They point out that the procedure for collecting a urine specimen from an

employee requires that individual privacy be preserved unless there are grounds to suspect tampering:

> While the specimen collector may be outside the bathroom or restroom in the near proximity, the employee closes (and locks, if he/she chooses) the door and has full privacy while urinating. . . . The employee is afforded as much privacy as he/she would ordinarily have when using a restroom/bathroom at the workplace, a restaurant, or other public environment.

Report of Donna R. Smith, Ph.D., July 8, 2002, p. 1. This procedure is even less intrusive than the "indirect monitoring" (requiring monitor to wait outside closed restroom stall) sustained in *Earls* as a "negligible intrusion." See also, *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386 (holding the intrusion "negligible" even though male students were required to produce samples at a urinal along a wall while observed from behind). The instrusiveness of this procedure, marked by careful respect for employee privacy, does not even approach, of course, that of a strip search, and is properly characterized as negligible.[1]

Further, defendants insist that every effort is made to protect the confidentiality of test results. Information is not released to any law enforcement agency. In fact, unless the employee consents in writing, test results are not disclosed to anyone other than the employee, the Medical Review Officer ("MRO") and the employer. The MRO is a physician with specialized knowledge of substance abuse disorders and drug testing procedures. The MRO reviews and interprets test results and confidentially discusses any possible medical

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[1] That the instant drug testing program results only in minimal intrusion is underscored by the UAW's concession that, because only 15 percent of the affected workforce is tested each year, an individual employee can be expected to be tested only once every seven years on average.

explanation for a positive result with the employee before reporting the results to the employer. Positive results may lead to the imposition of discipline, but any adverse action is subject to the grievance and arbitration processes provided in the Collective Bargaining Agreement. All of these circumstances militate in favor of upholding the testing as being minimally intrusive. See *Earls*, 122 S.Ct. at 2566-67.[2]

To be sure, employees in test-designated positions retain their Fourth Amendment rights. Yet, considering the minimally intrusive nature of the drug and alcohol testing required under Article 52, the Court is convinced that employees' ordinary right to freedom from suspicionless testing is outweighed by the State's substantial public safety concerns.

V

The Court has thus duly considered the competing interests implicated by the State's random drug and alcohol testing program and by the UAW's Fourth Amendment challenge to it. Under the still developing governing body of law it is clear that the program embodied in Article 52 of the Collective Bargaining Agreement is supported by sufficient "special needs," that is, legitimate governmental purposes other than law enforcement. Further, the State's public safety concerns are sufficiently substantial to outweigh the relatively minor intrusion upon privacy rights caused by the subject suspicionless testing of designated employees. Accordingly, the Court concludes the challenged program is not unconstitutional. Plaintiffs' claim under 42 U.S.C. § 1983 for declaratory and injunctive relief must therefore be denied and judgment must be awarded in favor of defendants. The Court's judgment to this effect is set forth in a separate document.

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[2] Although the parties have not drawn a distinction between drug testing and alcohol testing in this regard, it is clear that a breathalyzer test is even less intrusive than urinalysis testing.

AMENDED JUDGMENT ORDER [1]

Plaintiffs International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) and its affiliated Local 6000, hereinafter referred to collectively as "UAW," in the lone remaining count of their first amended complaint, count I, having under 42 U.S.C. s 1983, challenged the constitutionality of random drug and alcohol testing imposed by defendant state officials upon many UAW-represented employees, who are classified state employees in the Department of Corrections, Department of Community Health, Department of Military and Veteran Affairs, and Department of Education; and

The UAW contending that the testing is violative of the Fourth Amendment protection against unreasonable searches and having sought declaratory and injunctive relief; and

The parties having submitted the matter to the Court on stipulated facts and briefs in lieu of trial, and the Court having heard oral arguments on the matter on October 28, 2002, and having taken the matter under advisement; and

The Court having carefully considered the claim under controlling Supreme Court and Sixth Circuit authorities, and having undertaken a context-specific examination of the competing private and public interests advanced by the parties; and

The Court finding that the challenged state drug and alcohol testing program is justified by sufficiently substantial "special needs" and holding that the subject random drug and alcohol testing is not violative of the Fourth Amendment;

---

[1] The original judgment order issued on March 31, 2003. This amended judgment order effects only technical corrections, amending the caption so as to delete defendant Douglas Howard, and deleting reference to the Family Independence Agency, in conformity with the stipulated order dated July 11, 2002 (docket # 47).

Now therefore, and for the reasons more fully set forth in the Court's accompanying written opinion;

IT IS HEREBY ORDERED that the UAW's claim for declaratory and injunctive relief is DENIED, and JUDGMENT is hereby AWARDED to defendants.

APPENDIX C

ARTICLE 52
DRUG AND ALCOHOL TESTING

ARTICLE 52, Section 1: Definitions

As used in this article:

(a) Alcohol test means a chemical or breath test administered for the purpose of determining the presence or absence of alcohol in a person's body.

(b) Drug means a controlled substance or a controlled substance analogue listed in schedule 1 or schedule 2 of part 72 of the Michigan public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7201, et seq., of the Michigan Compiled Laws, as may be amended from time to time.

(c) Drug test means a chemical test administered for the purpose of determining the presence or absence of a drug or metabolites in a person's bodily fluids.

(d) Random selection basis means a mechanism for selecting test designated employees for drug tests and alcohol tests that (1) results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected and (2) does not give the employer discretion to waive the selection of any employee selected under the mechanism.

(e) Reasonable suspicion means a belief, drawn from specific objective facts and reasonable inferences drawn from those facts in light of experience, that an employee is using or may have used drugs or alcohol in violation of a departmental work rule or a civil service rule or regulation. By way of example only, reasonable suspicion may be based upon any of the following:

(1) Observable phenomena, such as direct observation of drug or alcohol use or the physical symp-

toms or manifestations of being, impaired by, or under the influence of, a drug or alcohol.

(2) A report of on-duty or sufficiently recent off-duty drug or alcohol use provided by a credible source.

(3) Evidence that an individual has tampered with a drug test or alcohol test during employment with the State of Michigan.

(4) Evidence that an employee is involved in the use, possession, sale, solicitation, or transfer of drugs or alcohol while on duty, while on the employer's premises, or while operating the employer's vehicle, machinery, or equipment.

(f) Rehabilitation program means an established program to identify, assess, treat, and resolve employee drug or alcohol abuse.

(g) Test-designated employee means an employee who occupies a test designated position.

(h) Test-designated position means any of the following:

(1) A safety-sensitive position in which the incumbent is required to possess a valid commercial driver license or to operate a commercial motor vehicle, an emergency vehicle, or dangerous equipment or machinery.

(2) A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.

(3) A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.

(4) A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.

(5) A position in which the incumbent has unsupervised access to controlled substances.

(6) A position in which the incumbent is responsible for handling or using hazardous or explosive materials.

(7) Another position agreed to in secondary negotiations.

Section 2: Prohibited Activities.

An employee shall not do any of the following:

(a) Consume alcohol while on duty.

(b) Consume drugs while on duty, except pursuant to a lawful prescription issued to employee.

(c) Report to duty or be on duty with a prohibited level of alcohol or drugs present in the employee's bodily fluids.

(d) Refuse to submit to a required drug test or alcohol test.

(e) Interfere with any testing procedure or tamper with any test sample.

Section 3: Testing Employees.

The employer may require an employee, as a condition of continued employment, to submit to a drug test or an alcohol test, as provided in this article.

(a) Tests Authorized.

(1) Reasonable suspicion testing. An employee shall be required to submit to a drug test or an alcohol test if there is reasonable suspicion that the employee has violated this article.

(2) Preappointment testing. An employee not occupying a test designated position shall submit to a drug test if the employee is selected for a test-designated position.

(3) Follow-up testing. An employee shall submit to an unscheduled follow-up drug test or alcohol test if, within the previous 24-month period, the employee voluntarily disclosed drug or alcohol problems, entered into or completed a rehabilitation program for drug or alcohol abuse, failed or refused a Preappointment drug test, or was disciplined for violating this rule.

(4) Random selection testing. A test-designated employee shall submit to a drug test and an alcohol test if the employee has been selected for testing on a random selection basis.

(5) Post-incident testing. A test-designated employee shall submit to a drug test or an alcohol test if there is evidence that the test designated employee may have caused or contributed to an on duty accident or incident resulting in death, or serious personal injury requiring immediate medical treatment, that arises out of any of the following:

(a) The operation of a motor vehicle.

(b) The discharge of a firearm.

(c) A physical altercation.

(d) The provision of direct health care services.

(e) The handling of dangerous or hazardous materials.

(b) Limitations on certain tests.

(1) Test selection. An employee subject to testing under this rule may be required to submit only to a

drug test, only to an alcohol test, or to both tests. How-ever, preappointment testing shall be limited to drug testing.

(2) Limitations on follow-up testing. The employer may require an employee who is subject to follow-up testing to submit to no more than six unscheduled drug or alcohol tests within any twelve month period.

(3) Limitations on random selection testing. The number of drug tests conducted in any one year on a random selection basis shall not exceed fifteen percent (15%) of the number of all test-designated positions. The number of alcohol tests conducted in any one year on a random selection basis shall not exceed fifteen percent (15%) of the number of all test-designated positions.

(4) Limitations on reasonable suspicion testing. Before an employee is subject to reasonable suspicion testing, a trained supervisor must document the basis for the reasonable suspicion. In addition, an employee shall not be subject to a reasonable suspicion test until the employer-designated drug and alcohol testing coordinator (DATC), or the DATC's designee, has given express, individualized, approval to conduct the test.

Section 4: Drug and Alcohol Testing Protocols

(a) Drug testing protocol. The employer will adopt the current "Mandatory Guidelines for Federal Workplace Drug Testing Programs," as amended, issued by the U.S. Department of Health and Human Services (the "HHS Drug Guidelines") as the protocol for drug testing under this article.

(b) Alcohol testing protocol. The employer will adopt the alcohol testing provisions of the current "Procedures

for Transportation Workplace Drug and Alcohol Testing Programs," as amended, issued by the U.S. Department of Transportation (the "DOT Alcohol Guidelines") as the protocol for alcohol testing under this article.

(c) Changes in protocol. During the term of this agreement, the parties may agree to amend the protocols without the further approval of the Civil Service Commission to include any final changes to the HHS Drug Guidelines or the DOT Alcohol Guidelines that are published in the Federal Register and become effective. If the parties agree to adopt any such final changes, the parties shall notify the State Personnel Director in writing of the changes and their effective date. Any other change in the protocols requires the approval of the Civil Service Commission.

Section 5: Prohibited Levels of Drugs and Alcohol

(a) Prohibited Levels of Drugs. It is a violation of this article for an employee to test positive for any drug under the HHS Drug Guidelines at the time the employee reports to duty or while on duty. A positive test result shall constitute just cause for the employer to discipline the donor.

(b) Prohibited Levels of Alcohol. It is a violation of this article for an employee to report to duty or to be on duty with a breath alcohol concentration equal to or greater than 0.02. A confirmatory test result equal to or greater than 0.02 shall constitute just cause for the employer to discipline the employee.

Section 6: Penalties.

(a) The employer may impose discipline, up to and including dismissal, for violation of this article. All discipline for violation of any provision of this article shall be subject to the provisions of Article 9 regarding discipline.

(b) An employee selected for a test-designated position shall not serve in the test-designated position until the employee has submitted to and passed a pre-appointment drug test. If the employee fails or refuses to submit to the drug test, interferes with a test procedure, or tampers with a test sample, the employee shall not be appointed, promoted, reassigned, recalled, transferred, or otherwise placed in the test-designated position. The Department of Civil Service shall also remove the employee from all employment lists for test-designated positions and shall disqualify the employee from any test-designated position for a period of three years. In addition, if the employee interferes with a test procedure or tampers with a test sample, the employee may also be disciplined by the employer as provided in subsection (a). An employee's qualification for appointment in the classified service is a prohibited subject of bargaining and any complaint regarding action by the Department of Civil Service shall be brought only in a Civil Service technical appeal proceeding.

Section 7: Self-reporting.

(a) Reporting. An employee who voluntarily discloses to the employer a problem with controlled substances or alcohol shall not be disciplined for such disclosure if, and only if, the problem is disclosed before the occurrence of any of the following:

(1) For reasonable suspicion testing, before the occurrence of an event that gives rise to reasonable suspicion that the employee has violated this rule.

(2) For preappointment testing, follow-up testing, and random selection testing, before the employee is selected to submit to a drug test or alcohol test.

(3) For post-incident testing, before the occurrence of any accident that results in post-accident testing.

(b) Employer action. After receiving notice, the employer shall permit the employee an immediate leave of absence to obtain medical treatment or to participate in a rehabilitation program. In addition, the employer shall remove the employee from the duties of a test-designated position until the employee submits to and passes a follow-up drug test or alcohol test. The employer may require the employee to submit to further follow-up testing as a condition of continuing or returning to work.

(c) Limitation. An employee may take advantage of the provisions of section 7(a) no more often than two times while employed in the classified service. An employee making a report is not excused from any subsequent drug or alcohol test or from otherwise complying in full with this article. An employee making a report remains subject to all drug and alcohol testing requirements after making a report and may be disciplined as the result of any subsequent drug or alcohol test, including a follow-up test.

Section 8: Union Representation.

If an employee is directed to submit to a reasonable suspicion drug or alcohol test, the employee may confer with an available UAW representative in per-son (if available on site) or by telephone. However, such contact shall not unreasonably delay the testing process.

Section 9: Identification of Test-designated Positions.

Each appointing authority shall first nominate classes of positions, subclasses of positions, or individual positions to be test-designated. The state employer shall review the nominations and shall designate as test designated positions all the classes, subclasses, or individual positions that meet one or more of the requirements of section 1(h) of this article. The designation by the state employer shall not be limited by or to the nominations or recommendations of the appointing

authority. The appointing authority shall give written notice of designation to each test-designated employee and to the UAW at least fourteen (14) days before implementing the testing provisions of this rule.

The UAW may file a grievance contesting the designation of a particular position. However, an employee occupying a position designated as a test designated position who is given notice of the designation shall be subject to testing as provided in this article until a final and binding determination is made that the employee is not occupying a test-designated position.

Section 10: Coordination of Rule and Federal Regulations.

The provisions of this article are also applicable to employees subject to mandatory Federal regulations governing drug or alcohol testing. However, in any circumstance in which (1) it is not possible to comply with both this rule and the Federal regulation or (2) compliance with this rule is an obstacle to the accomplishment and execution of any requirement of the Federal regulation, the employee shall be subject only to the provision of the Federal regulation.

(2)

No. 04-1009

Supreme Court, U.S.
FILED
MAR 29 2005
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In the
Supreme Court of the United States

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS AFFILIATED LOCAL 6000, . .

Petitioners,

v

DAVID FINK, JANET OLSZEWSKI, PATRICIA L. CARUSO, THOMAS D. WATKINS, JR., THOMAS G. CUTLER,

Respondents,

JAMES D. FARRELL,

Respondent-Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

I. Under the Fourth Amendment, the federal courts have recognized that public sector employees may be subject to random drug and alcohol testing. In a facial constitutional challenge, does a narrow and specifically tailored random-based-selection testing program implemented for state employees occupying test-designated positions serve the substantial public interest in protecting the health and safety of the public, fellow employees, and the vulnerable populations under the jurisdiction of the state agencies sufficient to override the minimal intrusion on the Fourth Amendment rights of these state employees?

II. Some showing of drug and alcohol abuse in the work place may shore up an assertion of a special need to justify a random drug and alcohol testing program. In a facial constitutional challenge, does a narrowly and specifically tailored random-based-selection testing program comply with the Fourth Amendment where evidence of historical drug and alcohol work-related incidents existed although there is no evidence of a pervasive or particularized problem?

PARTIES

Respondents agree with Petitioners' summary of the parties with one exception. John F. Lopez, as the State Personnel Director charged with administrating the Michigan Civil Service Commission's random drug and alcohol testing program, intervened as a defendant in the district court and filed as an appellee in the Sixth Circuit. James D. Farrell has recently been appointed the State Personnel Director and thus, should be substituted as a respondent. Rule 35.3.

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OPINIONS BELOW

Petitioners properly state that the decision of the Sixth Circuit Court of Appeals is reported at 385 F.3d 1003 (6th Cir. 2004.) The United States District Court for the Western District of Michigan, however, issued two decisions that are reported at Opinion of United States District Court, Docket No. 5:00-CV-21, 2001 U.S. Dist. LEXIS 4560 (March 30, 2001), Resp. App. 1b-15b, and 336 F. Supp. 2d 686, (W.D. Mich., 2003.)

JURISDICTION

Respondents agree with Petitioners' jurisdiction statement.

STATEMENT OF THE CASE

Respondents (State Officials) implement a random drug and alcohol testing program (program) for selected positions within the state's classified civil service where incumbents of the positions perform safety sensitive functions for the vulnerable populations under the state's jurisdiction. These employees also hold positions in a highly regulated environment. The state's program replicates the existing programs implemented in the federal government. Petitioners claim the program violates the Fourth Amendment because prior testing by the state did not evidence a pervasive or particular drug and alcohol problem and the testing is performed on a random rather than a selected basis.

A. The Michigan Civil Service Commission Adopted A Random-Based-Selection Drug and Alcohol Program

Under Michigan's Constitution, Mich. Const. 1963, art. 11, § 5, the Michigan Civil Service Commission (Commission) has the power to regulate the terms and conditions of employment for the State's civil service. In 1999, the Commission adopted a random-based-selection drug and alcohol testing program (program) for state employees who held positions where the duties included protection of the health and safety of the public and aid to the vulnerable populations under the jurisdiction of the state. 6th Cir. Jt. Apx. 94 Stip. ¶ 41; 97 Stip. ¶¶ 51-52; 108 Stip. ¶ 89; Pts. App. 36a-37a. Petitioners represent approximately 20,000 state positions, of which 2,855 positions are subject to such testing.[1] 6th Cir. Jt. Apx. 86 Stip. ¶3; 105 Stip. ¶¶78-79; 106 Stip. ¶¶ 83-84.

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[1] At the time of the entry of the Stipulation, State Officials test designated 2858 positions represented by Petitioners. 6th Cir. Jt. Apx. 106-107, Stip. ¶¶83-84. By the time the district court held oral arguments, the physicians' positions had been abolished and were no longer represented by Petitioners. Thus, 2855 positions remained as test-designated at the time the lower court decisions were rendered.

1. The Commission Incorporated A Previously Adopted Program in Agreement Between Petitioners and State.

The Commission incorporated this program into the 1999-2001 Collective Bargaining Agreement (Agreement) between Petitioners and the State of Michigan. Article 52 of the Agreement identified seven position categories that required employees to perform duties that had a significantly greater threat to the health and safety of the public, fellow state employees, and others, than those duties performed by other classified employees. Pet. App. 36a-44a. For example, these duties may require an employee to react to unusual or dangerous circumstances and avoid serious consequences due to errors in judgment. In these situations, substance abuse by certain state employees poses a more significant threat than for employees in other classified positions. 6th Cir. Jt. Apx. 96 Stip. ¶ 49; 401. The 2855 positions represented by Petitioners fit within four of the seven test-designated categories of duties:

> Category 2: A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty;
>
> Category 3: A position in which an employee on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions;
>
> Category 4: A position in which an employee has regular unsupervised access to and direct contact with prisoners, probationers, or parolees; and
>
> Category 5: A position in which an employee has unsupervised access to controlled substances. [6th Cir. Jt. Apx. 105 Stip. ¶¶ 81-82; Pts. App. 37a, Agreement, Art. 52, § 1(h).]

Petitioners stipulated that the test-designated positions occupied by these employees performed duties in varying amounts, within one of the four categories. 6th Cir. Jt. Apx. 108 Stip. ¶ 89. Besides substantially limiting the number of positions subject to testing by adoption of these categories, Michigan's program significantly limits the number of random tests conducted in any one year; not to exceed fifteen percent (15%) of all test-designated positions. Pts. App. 40a Agreement, Art. 52, Sec. 3(b)(3).

2. Michigan's Program Parallels the Federal Government's Program.

The federal government's position on this issue is already well-known. The drug and alcohol testing program adopted by the Commission parallels the federal government's programs that have been in existence since 1986. Between 1986 and 1988, the federal government, through an Executive Order, established a random testing program for all federal employees in "sensitive positions." 6th Cir. Jt. Apx. 87-91 Stip. ¶¶ 11-24. In 1995, Congress adopted the Omnibus Transportation Employee Testing Act, 49 U.S.C. § 31306, (OTETA), which provided random testing for transportation "safety-sensitive" positions. 6th Cir. Jt. Apx. 89-90 Stip. ¶¶ 22-23. Starting in 1996, the Federal Bureau of Prisons has required random testing of all prison employees. 6th Cir. Jt. Apx. 90-91 Stip. ¶ 24.

The Commission also mandated protocols that coincide with those the federal government adopted for drug and alcohol testing. State Officials use the alcohol testing provisions of the OTETA "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" and the U.S. Department of Health and Human Services (HHS)"Mandatory Guidelines for Federal Workplace Drug Testing Programs." 6th Cir. Jt. Apx. 97, 99-100 Stip. ¶¶ 52-54; Pts. App. 40a-41a, Agreement Art. 52, § 4. The HHS drug guidelines reflect the "detectable levels that accurately determine if the employee has used the banned

drug" and require indirect monitoring of the collection process. 6th Cir. Jt. Apx. 97 Stip. ¶ 52.

3. Michigan's Program was Implemented After Rigorous Review of All Positions Nominated by State Officials.

The staff of the Michigan Office of State Employer (OSE) was charged with identifying through a rigorous process those positions that fit within the seven categories of duties. First, it asked the state agencies to nominate those positions whose duties satisfied one of the seven categories. 6th Cir. Jt. Apx. 101-102 Stip. ¶¶ 63-67; 466-467. Second, OSE required these entities to submit a position description for the nominated position or submit a composite position description for multiple positions that proves the position fit within one of these categories. 6th Cir. Jt. Apx. 102 Stip. ¶65; 468-469. Third, before rendering any decision, OSE compared the position descriptions with the criteria for test-designated status and reviewed the current random testing case law. 6th Cir. Jt. Apx. 103 Stip. ¶ 69; 402.

OSE submitted a preliminary list of 16,873 test-designated positions statewide, positions represented by various collective bargaining units or unrepresented. 6th Cir. Jt. Apx. 102 Stip. ¶ 68; 470-536 Stip. Exh. 29. Of the 16,873 state-wide positions, Petitioners represented 2,855 of those positions. Before the program was implemented, OSE met with Petitioners, provided them with the tentative list of test-designated positions they represented and described the process to determine the 2,855 test designated positions under Petitioners' auspices. 6th Cir. Jt. Apx. 103-104 Stip. ¶¶ 72-77; 106 Stip. ¶ 83, 545. OSE refused to designate for random testing 266 other positions represented by Petitioners that the state agencies nominated. 6 th Cir. Jt. Apx. 106 Stip. ¶ 83. Extensive training was provided to all state employees. Random testing began in March 2000. 6th Cir.Jt. Apx. 110 Stip. ¶ 94

4. State Officials Proffered A Significant Rationale to Support Random Testing

In the district court, the parties stipulated to the facts in lieu of trial. Ultimately, the parties stipulated to 170 paragraphs of facts and ten volumes of 56 exhibits. 6th Cir. Jt. Apx. 85-130; 316-1059. These stipulated facts and exhibits prove the special needs that warrant random testing instituted by the State of Michigan.

First, the State Officials selected categories of duties that implicated public safety concerns and then undertook a rigorous process designed to identify those positions that fit in the categories. Pet. App. 24a; 6th Cir. Jt. Apx. 101-108 Stip. ¶¶ 63-89; 466-693 Stip. Exhs. 27-41. For instance, the Michigan Constitution requires state officials to properly address the important public health and safety concerns of its citizens. Mich. Const. 1963, art. 4, § 51, art. 8, § 8. (6th Cir. Jt. Apx. 111 Stip. ¶¶ 100,102.) The Michigan Legislature also requires these officials to protect the general welfare and safety of the vulnerable populations these state agencies serve: Education - Mich. Comp. Laws §§ 393.51, *et seq,* 393.101 *et seq* (6th Cir. Jt. Apx. 112 Stip. ¶ 105); Parole and Probation Officers - Mich. Comp. Laws §§ 764.23, 791.204, 791.206 (4)(a), 791.236(4), 791.239 (6th Cir. Jt. Apx. 113 Stip. ¶¶ 111; 112; 114 ¶¶ 118-120; 1037, Stip. Ex. 50.); Health Professionals - Mich. Comp. Laws §§ 333.1101, 333.6107(3), 333.16167, 333.16170, 333.16221(b)(ii)-(iii), 333.16226 (6th Cir. Jt. Apx. 120-121 Stip. ¶¶ 145-151.) The State Officials have established policies to fulfill these responsibilities and to inform their employees of their role in fulfilling these goals. 6th Cir. Jt. Apx. 111 Stip. ¶¶101; 103-104 Stip. ¶¶ 72-77; 111-112 Stip. ¶¶ 100, 103-104, 107-108; 114 Stip. ¶¶121-122.

Second, each category covered by the State's program presents legitimate and important concerns regarding on-duty alcohol and drug abuse. Employees working in test-designated positions pose a significantly greater potential threat to the

health and safety of themselves and others and may be required to react to unusual or dangerous circumstances. Substantially greater consequences can occur from an error in their judgment or performance, and serious injury or death may be the result. Pet. App. 24a; 6th Cir. Jt. Apx. 401, Stip. Exh. 21.

Third, the selected employees knowingly have accepted careers in fields of highly regulated employment, which relate to safety *per se*. These employees may need special licenses to be eligible for such public employment. 6th Cir. Jt. Apx. 120-121 Stip. ¶¶ 145-152; 123 Stip. ¶ 162.

a. The Correctional Facility Setting Presents A Threat to the Safety and Security of Its Population and Fellow Employees

Over 80 percent of the prisoner population in the custody of the Department of Corrections (DOC) had a documented history of alcohol and drug abuse. 6th Cir. Jt. Apx. 1096-1097, Stip. Tr. of Kenneth McGinnis, DOC Director. The introduction of alcohol and drugs presents a severe threat to the safety and security of the persons present in the state's correctional, mental, and medical facilities serving the prisoners. *Id.*

DOC recorded positive drug results even for those persons within the confines of its correctional facilities or within its jurisdiction: prisoners (3.7%), parolees (22.9%), and probationers (26.9%). 6th Cir. Jt. Apx. 1029 Stip. Ex. 48. DOC needs to control introduction of drugs in correctional facilities by visitors, deliverers, and employees. 6th Cir. Jt. Apx. 1096-1097 Stip. Tr. McGinnis.

It is difficult to detect when and if an employee is using drugs; thus, they could present a harmful presence to a correctional facility or in the parole or probation settings. 6th Cir. Jt. Apx. 1166 Stip. Exh. 46 Stip. Aff. McGinnis. Every employee working in a prison setting makes hundreds of

decisions that could adversely impact the safety of those institutions. 6th Cir. Jt. Apx. 1094-1098 Stip. Tr. McGinnis. The ability to randomly test bestows another tool for interdiction of drugs into those environments. 6th Cir. Jt. Apx. 1096-1097 Stip. Tr. McGinnis.

History proves that employees who abuse substances are more susceptible to being compromised by prisoners and more likely to bring drugs into the work place. *Id.* Employees are warned in DOC training that prisoners, parolees, and probationers will attempt to gain their confidence or attempt to coerce them. 6th Cir. Jt. Apx. 1166 Stip. Tr. McGinnis. Parolees and probationers who introduce drugs and alcohol in the "free community" pose an even greater threat to the safety and security of the public. *Id.* The largest category of employees covered by the State's program work with parolees and probationers.

b. Parole and Probation Officers and Field Services Assistants Are Subject to Random Testing.

In the community, 1,132 Parole or Probation Officers and 25 Field Service Assistants supervise 55,000 probationers and 12,000 parolees. These employees are given law enforcement powers, use firearms, and have regular unsupervised access to parolees or probationers. 6th Cir. Jt. Apx. 114 Stip. ¶¶ 116, 118. Here, Petitioners do not challenge the testing of the 405 parole and probationer officers who have applied for and maintain their eligibility to carry firearms. 6th Cir. Jt. Apx. 116 Stip. ¶ 128.

All employees in these positions "certainly participate in a heavily regulated field." Pet. App. 31a; 6th Cir. Jt. Apx. 114-116 Stip. ¶¶ 116-128. These employees form an integral part of the state's law enforcement network and serve as an "arm" of the judiciary. All parole and probation officers have statutory law enforcement powers, including the ability to arrest offenders under Mich. Comp. Laws § 791.239. 6th Cir.

Jt. Apx. 114 Stip. ¶¶ 118-119; 1042 Stip. Exh. 50. For instance, drug trafficking can result in revocation of an offender's probation or parole status. Mich. Comp. Laws § 333.7401.

Probation and parole officers must contact their clients through home and work visits that often result in these employees spending several days away from the office and out of physical contact with a supervisor. 6th Cir. Jt. Apx. 1167 Stip. Exh. 46 Aff. McGinnis. Agents in the field also take random urine samples of the parolee or probationer with over 40% of such tests being positive. *Id.*; 1029 Stip. Exh. 48.

These employees might be easily compromised to overlook obvious parole or probation violations. 6th Cir. Jt. Apx. 1098-1099 Stip. Tr. McGinnis. Thus, their behavior, if not properly supervised, could impact the public safety of the community. *Id.*, 1130-1132.

Finally, these employees have shown periodic substance abuse in the past. *Id.*, 1133. Even after the testing program took effect and the employees were given notice they would be subject to random testing, two probation/parole officers tested positive for cocaine use. *Id.*

c. Non-Custodial Employees Working Within Perimeter of Correctional, Veterans, or Mental Health Facility Are Subject to Random Testing.

Within the perimeter of the state's correctional facilities, 674 incumbents in non-custodial positions have regular unsupervised access to and direct contact with prisoners. These incumbents work as corrections athletic coordinators, corrections program coordinators, institution chaplains, prison counselors, recreational therapists, special education teachers, dietician/nutritionists, state transitional professionals, corrections executives, employment counselors,

communications assistants, and general office assistants. 6th Cir. Jt. Apx. 116 Stip. ¶¶ 129-131.

These employees are responsible for interdiction of drugs and alcohol and are exposed to these substances in the prison. 6th Cir. Jt. Apx. 1096-1097, 1166 Stip. Tr. McGinnis. Incumbents in these test-designated positions are responsible for the general supervision of the prisoner population and the maintenance of safety and security of the institution to the best of their degree. *Id.* An employee's failure to do so could affect an escape or other harmful situations. *Id.* These non-custodial employees received additional training, which although less than that received by the custodial staff, exceeds that provided to incumbents in positions who have no contact with prisoners. *Id.*, 1103.

These employees have a duty to meet with prisoners often on a one-to-one basis behind closed doors. Such privacy, while essential to the assignment, also affords these employees the opportunity to pass prisoners controlled substances. *Id.* A correction officer is not normally present in the classroom. *Id.* These employees must control critical tools inventory, such as a pair of scissors that a prisoner could potentially use as a lethal weapon. *Id.*, 1097-1098, 1104.

Similarly, incumbents in 42 positions in the Department of Community Health (DCH) have unsupervised contact with prisoners. 6th Cir. Jt. Apx. 116-117 Stip. ¶¶ 130-131. These positions include chaplains, recreational therapists, music therapists, special education teachers, dietician/nutritionists, registered nurses, and certain word processing assistants. *Id.*, 117 Stip. ¶¶ 132-133. These employees provide direct services to prisoners and are responsible for maintaining safety and security within an institutional setting. 6th Cir. Jt. Apx. 111 Stip. ¶104.

d. State Health Care Positions Are Subject to Testing.

Approximately 452 DOC positions, which include registered nurses, clinical nurse specialists, and occupational therapists, provide direct health care services and unsupervised access to prisoners. 6th Cir. Jt. Apx. 119 Stip. ¶¶ 142-144; 121 Stip. ¶¶ 153-157; 640 Stip. Exh. 40. Approximately 172 DCH positions provide health care services to prisoners as registered nurses, clinical nurse specialists, occupational therapists, and physician assistants. 6th Cir. Jt. Apx. 121 Stip. ¶ 154; 640 Stip. Exh. 40. Another 174 test-designated positions provide counseling and psychological services to prisoners, including school psychologists and clinical and mental health social workers. 6th Cir. Jt. Apx. 122 Stip. ¶ 157.

Incumbents in these prison positions dispense and have access to medications such as codeine, morphine, amphetamines, and barbiturates. 6th Cir. Jt. Apx. 1088-1089 Stip. Tr. Gayle Lafferty, DOC Medical Director. They diagnose, treat, monitor, and observe patients without supervisory oversight. *Id.*, 1087-1088, 1093 Stip. Tr. Lafferty; 1166 Stip. Ex. 46 Aff. McGinnis. Incumbents in certain health care positions assist in invasive procedures such as surgeries or cerebral spinal fluid taps and use medical instruments such scalpels and syringes, which are deemed contraband in the wrong hands. 6th Cir. Jt. Apx. 1089-1090 Stip. Tr. Lafferty.

In DCH, 518 health care positions deliver similar medical services to mentally ill and developmentally disabled residents of state hospitals and institutions. 6th Cir. Jt. Apx. 122-123 Stip. ¶¶ 159-162; 640 Stip. Ex. 40. Fifteen health care positions provide care to 1000 veterans in two health care facilities under the jurisdiction of the Departments of Education and Military & Veterans Affairs. 6th Cir. Jt. Apx. 124 Stip. ¶164. One registered nurse position has been test-designated since its duties include delivery of health care to the clients of the

School for the Deaf and the Blind in Flint. 6th Cir. Jt. Apx. 123 Stip. ¶ 163.

It is clear that the special needs shown in this case are substantially more than a symbolic desire to project a public image.

5. Petitioners Have Limited Their Judicial Challenges.

By the actions taken in the lower courts, Petitioners waived their argument that the lower courts should have evaluated each position description and limited its complaint to a facial constitutional challenge. First, Petitioners agreed that the 2858 positions in question require performance of duties, in varying amounts, within one or more of the four challenged categories and thus, cannot argue at the appellate level that the lower courts failed to perform a sufficient evaluation of the chosen positions. Pet. App. 2a, n.2; 6th Cir. Jt. Apx. 108 ¶ 89. Petitioners made this stipulation after receipt of approximately seven boxes of documents, consisting of twenty-two binders of the position descriptions and job specifications for each of the 2,858 test-designated positions. 6th Cir. Jt. Apx. 106-109 ¶¶ 84-88. Thus, Petitioners abandoned their challenge that the program violated the Fourth Amendment as applied.

Second, Petitioners object to the program in question because allegedly no historical evidence exists of a drug or alcohol problem in the workplace. As early as 1990, Petitioners have opposed, as a matter of policy, the imposition of <u>any</u> random testing program in any employment environment except for those mandated by governmental regulations. 6th Cir. Jt. Apx. 320 Stip. Ex. 5. Here, Petitioners take an inconsistent position to their policy by agreeing that Michigan's civil service employees, who properly apply for and maintain their eligibility to carry firearms, may be subject to random testing. 6th Cir. Jt. Apx. 116 ¶ 128. No governmental regulation, however, mandates such testing.

Third, Petitioners assert that random testing for alcohol violates the Fourth Amendment. Early on the district court dismissed Petitioners' allegation that the score for a positive alcohol test rate was unconstitutional. Resp. App. 7b-8b. Petitioners never addressed their constitutional allegations on the alcohol testing until oral argument and only after the district court suggested Petitioners could still argue the claim. Petitioners, however, offered no evidence in support of its claims at the district court level and did not seriously contest this issue. The lower courts held constitutional the random alcohol testing program.

6. A History of Drug and Alcohol Abuse Existed in State Government Before Adoption of the Program.

The State Officials proffered a history of drug and alcohol abuse by employees working in State facilities. For instance, positive drug and alcohol results were occurring from tests required by federal law before the state developed this program. 6th Cir. Jt. Apx. 93 Stip. ¶ 35; 94 Stip. ¶ 42; 112 Stip. ¶ 109; 366 Stip. Exh. 13; 383-390 Stip. Exhs. 17, 18, 18a; 1029-1036 Stip. Exh. 48-50. The State Officials recounted incidents of classified employees, including teachers in the State's correctional facilities, either using drugs or alcohol or carrying them into state facilities. 6th Cir. Jt. Apx. 366 Stip. Ex. 13; 1032 Stip. Ex. 49. Employees, including those working in Petitioners' positions, such as registered nurses, forensic security aides, library assistants, word processor assistants, and trades inspectors, brought illegal substances into prisons or community health facilities. 6th Cir. Jt. Apx. 1032-1036 Stip. Exh. 49; 1064-1085 Stip. Ex. 16. Although this history cannot be characterized as a pervasive problem, the absence of such a degree of abuse does not defeat the program under the Fourth Amendment as suggested by Petitioners.

The State Officials, in cooperation with Petitioners, gave individual notice of the random test program to all classified employees. 6th Cir. Jt. Apx. 105 Stip. ¶ 80. Even after such

notice, positive test results continued to occur after the program was instituted. 6th Cir. Jt. Apx. 1025-1028 Stip. Exh. 44; 1032-1036 Stip. Exh. 49. Although Petitioners state that none of its members have been found "impaired," members who held parole/probation officer and nursing positions between 1999 and 2001 tested positive for drugs under random testing. 6th Cir. Jt. Apx. 119 Stip. ¶ 141; 122 Stip. ¶ 158; 1025-1028 Stip. Exh. 44. Probationer/parolee officers also have tested positive for alcohol use after reasonable suspicion existed. *Id.* Thus, drug and alcohol work related incidents by employees existed in the state agencies.

B. Michigan's Program was Held Constitutional by the Lower Courts.

Petitioners present a constitutional challenge "on its face" and not "as applied." Petitioners simply assert that the random nature of the testing violates the Fourth Amendment and the absence of a pervasive drug and alcohol abuse history does not justify a warrantless search.

After submission of 170 paragraphs of stipulated facts, 56 exhibits, and briefs in lieu of trial, the district court undertook the review warranted as a matter of law and ruled that the drug and alcohol testing program did not violate the Fourth Amendment. Pet. App. 18a. The district court dismissed Petitioners' argument that the absence of a particularized drug history warrants rejection of the program and stated that this Court has recognized that evidence of such a history is not essential. Pet. App. 27a-28a.

Against this backdrop, the district court critically evaluated the state's asserted needs. Pet. App. 24a-30a. The court found that the state's justification for random drug and alcohol testing is "much more akin to those presented in *Von Raab* [*Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)] than in *Chandler* [*Chandler v. Miller*, 520 U.S. 305 (1997)]." Pet. App. 38a. Further, the public safety concerns implicated

by the State's program are "much stronger than both those presented and found wanting in *Chandler* and those presented and found sufficient in *Earls* [*Pottawatomie County v. Earls*, 536 U.S. 822 (2002).]" Pet. App. 23a.

The district court balanced whether these special needs outweighed an individual employee's reasonable expectation of privacy, concluded that the employees clearly participated in heavily regulated industries, and found "the UAW did not seriously contest the proposition that employees in these positions have diminished expectations of privacy." Pet. App. 30a-33a. The fact that the state maintains confidentiality, established a sound medical review process, and provides for an administrative review process for any discipline imposed "militate[d] in favor of upholding the testing as being minimally intrusive." *Id.*, 33a.

The district court earlier dismissed Petitioners' challenge that State Officials improperly dismissed employees who tested positive on drug or alcohol tests. Resp. App. 7b-8b. Thus, no evidence on the record exists to support Petitioners' claim to this Court that the "State terminated those who tested positive for drugs and disciplined all of those who tested positive for alcohol." (Pt. Br. p 7.)

The United States Court of Appeals for the Sixth Circuit performed a similar review of the facts and analysis of the law. Pet. App. 2a–16a. The Sixth Circuit evaluated the state's asserted special needs for the program and its impact on the state classified civil service employees who are subject to testing "in their own unique context." *Id.*, 12a. It concluded that the state offered substantial special needs for the program even though a pervasive drug abuse problem did not exist among the test-designated positions. *Id.*, 13a. The Sixth Circuit also concluded that the state's special needs outweighed the employees' reasonable expectations of privacy noting that every position chosen dealt with a highly regulated industry

and that the character of the intrusion was not "highly intrusive." *Id.*, 14a-15a.

REASONS FOR DENYING THE WRIT

This case does not present any important question of federal law.

In this facial constitutional challenge, the Court of Appeals held that the random drug and alcohol program narrowly tailored by the State Officials did not violate the Fourth Amendment. The Court of Appeals found substantial needs existed to prevent harm to the vulnerable population under the state's jurisdiction, fellow state employees, and the tested employees who serve, care, and protect this population in highly regulated fields that overrides the intrusion upon the tested employees. Hence, the Court of Appeals comported with the law developed by this Court.

The absence of a history of a pervasive or particularized drug or alcohol abuse by the selected public sector employees does not vitiate the random testing program. Moreover, the random selection of employees subject to testing bolsters the deterrence and interdiction of drugs and alcohol in the vulnerable settings where the selected employees work. These conclusions adhere to this Court's holdings and do not create any conflict of law.

This Court should deny certiorari for these reasons.

I. This Court Has Upheld the Constitutionality of a Narrowly Tailored, Random Governmental Drug and Alcohol Testing Program that Serves the Compelling Needs of Protecting Public Safety, Even in the Absence of A Pervasive or Particularized History of Abuse.

Here, Petitioners present a facial constitutional challenge of the state's random testing program. Under such a challenge, a

party must prove "whether the test contemplated...can ever be conducted." *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 632-633, n. 10 (1989). To succeed, Petitioners had to "establish that no set of circumstances exists under which the [program] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge is the "most difficult challenge to mount successfully. *Id.* Petitioners failed to introduce any evidence to meet this burden.

A. The Random Program Does Not Violate the Fourth Amendment Since A Context-Based Inquiry Shows Substantial, and Not Merely Hypothetical, Public Safety Concerns that Outweigh the Diminished Expectation of Privacy for the Selected Employees.

1. There Are Substantial Public Safety Concerns.

The Fourth Amendment protects individuals against unreasonable searches and seizures. A government-ordered collection of testing of urine samples[2] is a search within the meaning of the Fourth Amendment for it represents an intrusion upon privacy rights. *Skinner,* 489 U.S. at 619; *Von Raab*, 489 U.S. at 665. This Court has never found that random testing violates the Fourth Amendment. The crucial word in the Fourth Amendment is "reasonable" and the decision whether a particular government program is reasonable "requires a judgmental, forward-looking, balance-striking, probabilistic assessment, rather than a conclusive demonstration of measurable harms certain to be inflicted if the program is struck down." *Dimeo v. Griffin*, 943 F.2d 679, 681 (7th Cir. 1991) (citing to *Von Raab*, 489 U.S. at 674.)

Sufficiently compelling circumstances, according to this Court, may exist to justify the private intrusions and permit drug and alcohol testing where the government seeks to prevent the development of, or to discover, latent or hidden

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[2] A breathalyzer test for alcohol , moreover, is even less intrusive than an urinalysis test for drugs. *Skinner,* 489 U.S. at 625.

hazardous conditions. *Earls*, 536 U.S. at 828 (citing *Von Raab,* 489 U.S. at 667-68.) See also *Skinner,* 489 U.S. at 634 (authorizing suspicionless alcohol testing.) For instance, this Court found the government's interest in regulating the conduct of railroad employees to ensure safety, "like its supervision of probationers, or regulated industries, or its operation of a government office, school, or prison, likewise presents 'special needs' beyond normal law enforcement that may justify the departures from the usual warrant and probable-cause requirements." *Skinner*, 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-874 (1987).)

Earls extracted from prior decisions of this Court the elements necessary to perform a context-based analysis of whether a program violates the Fourth Amendment. *Earls,* 536 U.S. at 830-838. Here, the Court of Appeals engaged in the same factual analysis this Court has performed over the last 15 years and found the State Officials' random test program did not violate the Fourth Amendment. In doing so, the State Officials' invocation of special needs was not merely accepted, but rather the lower courts examined closely the interests advanced by the state as they related to the test-designated positions. Pet. App. 9a – 11a.

In this case, the situations and targeted groups covered by the test-designated categories are unique and discrete. Out of 60,977 state-wide positions, the State Officials chose 16,873 positions to be test-designated or 27% of the total positions available in the classified service. 6th Cir. Jt. Apx. 639 Stip. Ex. 39. Out of the 20,224 positions Petitioners represent, 2,855 positions or 14% were test-designated. *Id.* This designation only occurred after the Office of State Employer's staff painstakingly reviewed the position description and job classification for each position to determine if incumbents had to perform duties within any of the test-designated categories.

Each state agency, where the selected positions existed, had statutory missions to protect the public safety and security and

the vulnerable population they served. Thus, if the judgment of the incumbent could suffer from using drugs or alcohol, performance of the duties within each selected position was most susceptible to irreparable harm.

The parole or probation officers and field service assistants, the non-custodial employees who work within a prison perimeter, and the health care providers to those at-risk populations within the state's jurisdiction represent the crucial work force that fulfills the state's duties towards public safety and security. History has shown that 1) the introduction of alcohol and drugs into prisons presents a severe threat to its security and safety; 2) employees who are involved in substance abuse may be vulnerable to influence by others; and, 3) employees under the influence of drugs or alcohol suffer from diminished judgment that could impact their ability to perform duties, especially those requiring quick judgments, in a safe and secure manner. Pet. App. 10a.

State Officials had several experts evaluate the program. Dr. Donna Smith was instrumental in developing the drug and alcohol testing program mandated by the U.S. Department of Transportation (DOT), including being the principal author of DOT's final regulations for the program and working on the final work product for several other federal agency regulations, such as OTETA. 6th Cir. Jt. Apx. 236-237. These are the same regulations adopted by the State Officials for the program currently before this Court. She had the most first-hand knowledge about Michigan's program in her role as Senior Vice President of Substance Abuse Management, Inc.; an agency that provides Medical Review Officer and Third Party Administration services to over 5000 private and public sector employers, including Michigan. Dr. Smith concluded that the designated positions chosen were "consistent with the objectives of workplace safety, ensuring the quality of healthcare provided to the public, and fostering public confidence in public servants entrusted with the care and custody of at-risk populations." 6th Cir. Jt. Apx. 240-241.

2. The Selected Employees have a Diminished Expectation of Privacy and the Testing Intrusion is Minimal.

The selected employees who work in law enforcement, the medical profession, or inside a prison have long been a principal focus of regulatory concern. Thus, their expectations of privacy are diminished based upon the work they chose to perform. For instance, this Court in *Skinner,* 489 U.S. at 627, found that railroad employees were deemed to have diminished expectations of privacy because they participate in an industry pervasively regulated to ensure safety. In *Vernonia School Dist 47J v. Acton*, 515 U.S. 647, 657 (1995), student-athletes were deemed to be analogous to employees in a closely regulated industry since they have their own rules and regulations not applied to non-participating students. See also *Earls*, 536 U.S. at 833 (Applying the same reasoning to students participating in extracurricular activities.); *National Fed'n of Fed. Employees v. Cheney,* 884 F.2d 603, 612-613 (D.C. Cir., 1989) (Applying same reasoning to employment subject to a series of pre-employment screenings, including investigations into criminal, medical, employment, and educational histories, once hired, security personnel are subject to quarterly blood tests, annual medical examinations, annual criminal records checks, and periodic security investigations.); *Kemp v. Claiborne County Hosp.,* 763 F. Supp. 1362, 1368 (D. Miss., 1991) (Applying same rationale to health care employees.)

Moreover, the character of the testing intrusion is minimal and even less intrusive than the monitoring found by this Court in *Vernonia,* 515 U.S. at 658 as "negligible." In *Vernonia,* the male students produced samples at a urinal while observed from behind. Here, the regulations provides for indirect monitoring of the collection process unless evidence exists of sample tampering. 6th Cir. Jt. Apx. 99-100 Stip. ¶¶ 52, 54; Pet. App. 40a-41a. To limit the intrusion further, the State Officials

keep the test results confidential and do not turn over any results to any law enforcement agency. *Earls*, 536 U.S. at 848-849. This collection process is no different from the federal government process. 6th Cir. Jt. Apx. 258-263, 270 Dr. Ian MacDonald March 18, 2002 Report; 301, 304 Dr. Robert Willette March 14, 2002 Report. Hence, the intrusion here can be labeled as less than negligible.

In conclusion, this random testing program was instituted because sufficiently vital needs based on public safety concerns existed that outweighed the diminished expectation of privacy of the employees selected to be tested. The State Officials narrowly tailored and honed a program that assures the protections invoked under the Fourth Amendment.

B. Similar Random Testing of the Challenged Positions Has Been Held Constitutional by this Court and Other Federal Courts.

Before the State Officials even considered these programs, the federal courts had held constitutional random drug and alcohol testing for the duties within the four categories in question.

1. Public Sector Employees in Law Enforcement.

This Court, in *Skinner*, 489 U.S. at 619 and *Von Raab*, 489 U.S. at 670-671, recognized that persons in law enforcement may be subject to random testing. As noted, parolee and probation officers in this state perform law enforcement duties.

2. Public Sector Employees with Regular Unsupervised Access to and Direct Contact with Prisoners, Probationers or Parolees.

A concrete, and not merely hypothetical need, exists where drug interdiction is a necessary duty especially where an incumbent has regular, unsupervised access to, and direct

contact with prisoners, probationers, or parolees. *Von Raab*, 489 U.S. at 670-671. The possibility of blackmail or coercion by the prisoners is a valid concern to permit random drug testing, especially where employees have daily contact with prisoners. *Harmon v. Thornburgh,* 878 F.2d 484, 490-492 (Fed. Cir. 1989), *cert den, sub nom Bell v. Thornburgh*, 493 U.S. 1056 (1990). "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents special needs beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Griffin* 483 U.S. at 873-874. (This Court recognized supervision is necessary to ensure that probation restrictions are in fact observed and the community is not harmed by the probationer's at-large.) If incumbents in the parole and probation positions must assure this type of supervision, then surely a special need exists to warrant random testing of these incumbents.

Random testing on all employees working for a department of corrections could occur since such employees had regular access to the prisoners, a reasonable opportunity to smuggle drugs, and/or access to fire arms. *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989.) All Federal Bureau of Prison employees working within correctional institutions may be subject to random testing. *American Federal of Government Employees v. Roberts,* 9 F.3d 1464, 1468 (9th Cir. 1993). Federal probation and pretrial service officers are subject to similar testing. 6th Cir. Jt. Apx. 304 Dr. Robert Willette March 14, 2002 Report.

3. Public Sector Employees Who Provide Health Care Services.

Health care professionals can be subject to random testing because irremediable consequences result when an employee is not able to rectify his or her mistake and the coworkers of the employee have no opportunity to intervene before harm occurs.

Smith v. Fresno Irrigation District, 72 Cal. App.4th 147, Cal. Rptr.2d 775 (1999), *petition for rev. denied*, 1999 Cal. LEXIS 6066 (Cal. Aug. 25, 1999), citing *Kemp*, 763 F. Supp. at 1367 and *Harmon, supra*.

In *American Federation of Government Employees v Derwinski*, 777 F. Supp. 1493, 1499, (N.D. Cal. 1991), Veterans Administration health care staff had direct, active patient care in providing necessary diagnostic services, therapeutic care, or dissemination of drugs. Significantly, the Court permitted random testing and found that "[e]ven momentary lapses could cause serious consequences or at a minimum, if undiscerned, might subject a patient to procedures which would not have otherwise been indicated." *Id.* See also *Harmon*, 878 F.2d at 490, n. 8.

In *Pierce v. Smith*, 117 F.3d 866, 874, n. 9 (5th Cir. 1997), a medical resident could be subject to random testing where government extensively regulates the medical practice and even momentary lapses of attention can lead to disastrous consequences. Health care staff is not immune to drug abuse and the expectation of inquiry exists where the work depends on judgment and dexterity. See also *American Federation of Gov't Employees, AFL-CIO, Local 2391 v. Martin*, 969 F.2d 788 (9th Cir. 1992) (random testing permitted of nurses); *Kemp*, 763 F. Supp. at 1368 (random testing of staff preparing instruments and counting sponges.); *Plane v. United States*, 750 F. Supp. 1358, 1367-1368 (W.D. Mich. 1990) (random testing of nurses since they must "react swiftly", had access to medications, and diminished expectancy of privacy.)

Finally, the State Officials asked another expert, Donald Ian Macdonald, M.D., the former Director of the White House Drug Abuse Policy Office under President Ronald W. Reagan, to evaluate its program. Dr. Macdonald developed the initial phases of federal drug testing regulations to test federal safety-sensitive positions with the goal to protect an employee's privacy and eliminate the chances of a false positive. 6th Cir.

Jt. Apx. 245-250 Macdonald Resume. After reviewing the same objections Petitioners raise here, Dr. Macdonald concluded:

> The State of Michigan has designed a drug-free workplace program carefully patterned after the tested and proven federal model. The plaintiffs and their expert add nothing new to the objections that have been heard and rejected for the last 15 years. They do present data that is either dated, misleading, or false. [6th Cir. Jt. Apx. 270 March 18, 2002 Macdonald Report.]

In conclusion, the State Officials selected positions already found by the federal courts to be in compliance with the Fourth Amendment. Furthermore, the State Officials are implementing the same random testing as currently performed in the same positions in the federal government.

C. Michigan's Program Serves Significant Special Needs So It Is Constitutional, Even In the Absence of a History of Pervasive or Particularized Drug or Alcohol Abuse.

The State Officials did not need to wait until either a major accident occurred or evidence of massive drug use arose before implementation of a random testing program. This Court has recognized that government may take preemptive action to minimize the risks of a disaster: "the need to prevent and deter the substantial harm" provides the necessary immediacy for a random testing program and it would "make little sense" to wait for a substantial portion of the population tested to begin using drugs. *Earls*, 536 U.S. at 836.

The presence of abuse in the facilities in question would enhance the compelling needs the State Officials proved to warrant random testing. In *Chandler*, 520 U.S. 319, this Court rejected a suspicionless drug testing program established in

Georgia for any candidate for public office. Although finding the program unconstitutional, this Court acknowledged that a demonstrated problem of drug abuse, while not in all cases necessary, would "shore up an assertion of a special need for a suspicionless general search program." *Id.*

The lack of a history of drug abuse has not prevented the Court in the past from authorizing suspicionless drug testing. For instance, in *Von Raab,* 489 U.S. at 673, the Court upheld drug testing of custom officials on a purely preventive basis without any evidence of drug abuse problems. Even if such a requirement existed, the level of drug abuse that warranted constitutionality of a random drug test would be difficult to administer. *Id.* See also *Earls, supra.* The constitutionality of a program would be based upon a numerical formula; a process not previously adopted by the Court. Thus, the Court has never required a showing of a history of drug and alcohol abuse before finding a suspicionless testing program constitutional.

Here, the State Officials proffered ample evidence to show the compelling reasons for test-designating select positions. But the State Officials also showed that before adoption of this program, positive drug and alcohol results were being reported. The State Officials recounted incidents of classified employees, including teachers in the state's correctional facilities, either using drugs or alcohol or carrying them into state facilities. Employees, including those represented by Petitioners, such as forensic security aides, library assistants, word processor assistants, and trades inspectors, were bringing in illegal substances into the prisons or community health facilities.

Even after the State Officials gave advanced, individual notice of the random test program to all classified employees, positive tests continued to occur. Petitioners state that none of its members have been found "impaired at work," but their members who held parole/probation officer and nursing positions between 1999 and 2001 tested positive for drugs

under the random testing.[3] Probationer/parolee officers also tested positive for alcohol.

Thus, drug and alcohol work related incidents have existed in the state agencies subject to this suit. Even though a history of drug and alcohol abuse in the selected positions is not mandated to pass constitutional muster, the positive results in test-designated positions before and after implementing the random test program "shore up" the compelling needs shown for such testing today.

D. The Randomness of the Selection Process Represents an Effective Deterrent and in the Presence of Notice Prior to its Implementation, Does Not Unconstitutionally Infringe on the Selected Employee's Privacy.

The random testing program adopted in this case permits only 15% of the total test-designated positions to be tested in a year. This percentage does not demonstrate an unrelenting scrutiny or an unsettling show of authority infringing upon the Fourth Amendment Rights of the tested employees.

Here, Petitioners state as a matter of law that the random nature of the program requires more proof of compelling interests to outweigh the acknowledged invasion of privacy. (Pt. Br. pp 21-22.) No court has required such quantity of evidence. But even if such was the law, the State Officials would satisfy it.

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[3] Petitioners' expert, Dr. John Morgan, belittled the fact that the majority of positives show marijuana use. (Pt. Br. p 3.) Dr. Morgan's membership in NORML, an organization whose mission is to legalize marijuana, reflects his political agenda in criticizing Michigan's program. 6th Cir. Jt. Apx. 263-264 Macdonald March 18, 2002 Report. This Court, however, previously recognized that marijuana has mental and physical impacts on judgment and reaction time. *Vernonia*, 515 U.S. at 663.

In *Chandler,* 520 U.S. at 320, this Court rejected drug testing of potential candidates since the scheme was not a credible means to deter illicit drug users from seeking office where the candidate chose the date, time, and location of the test. On the other hand, this Court, in *Von Raab,* 489 U.S. at 676-677, approved a program where the applicant did not know when testing would occur.

Here, all classified employees, even those not subject to random testing, received notice and training on the program. Any surprise that an employee is subject to testing is substantially reduced because of this advance notice.

Moreover, the evidence showed that the random testing is an effective deterrent. Pet. App. 29a. As Dr. Macdonald stated, knowledge of a potential random test may be the most useful and strongest deterrent to substance abuse, especially if performed often enough. 6th Cir. Jt. Apx. 270 March 18, 2002 Macdonald Report.

A "definite sign that the program is working" can be proven by the 74% decline in positive test results in the national workplace. *Id.*, 256-257; Pet. App. 29a. Aware of the state's low positive rates, Dr. Macdonald noted that the rate for air traffic controllers and pilots is even lower, but such rates should not lead a "sensible person" to stop the testing of those "key personnel." 6th Cir. Jt. Apx. 257 Macdonald March 18, 2002 Report.

Random testing is an effective deterrent. *Id.*, 258; Pet. App. 29a. Knowledge of a potential random test may be the strongest deterrent to substance abuse, especially if performed often enough. Pet. App. 30a; 6th Cir. Jt. Apx. 258 MacDonald March 18, 2002 Report. See *Smith,* 72 Cal App. 4th at 162. "While it is true that random testing may increase employee anxiety and the invasion of the subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence. *American*

Federation of Government Employees v. Skinner, 885 F.2d 884, 890 (D.C.Cir. 1989). Michigan's program represents an effective deterrent and does not violate the Fourth Amendment.

II. No Conflict Exists Amongst the Circuit Courts or the States to Warrant Review by this Court.

The Arizona Supreme Court, in *Petersen v. City of Mesa*, 207 Ariz. 35, 83 P.3d 35 (2004*), cert denied*, _U.S._, 125 S. Ct. 51 (2004), rejected random testing of firefighters and despite Petitioners' reliance, this case is readily distinguished. First and foremost, a dearth of evidence existed, not only of a history of drug use, but also of the city's reasons for adopting random testing and its perceived need to conduct such testing in the first instance. *Petersen*, 207 Ariz. at 39, 83 P.3d at 39.

Second, Arizona found this Court's decisions in *Earls, supra,* and *Von Raab, supra,* distinguishable since firefighters had day-to-day scrutiny typical of the traditional work setting. The firefighters also did not work in the direct interdiction of drugs, did not carry firearms, and had no notice that they would be subject to testing. *Petersen,* 207 Ariz. at 40, 83 P.3d at 40. In this case, Petitioners stipulated that all the employees in positions selected for random testing in this case must interdict drugs, work in highly regulated industry or profession, may carry firearms, and/or are unsupervised when with their clients.

Third, Petitioners state that firefighters face more danger than the employees at issue here. The amount of danger the employees face does not warrant the random testing; it is the vulnerable populations they serve, the serious, irreparable harm that can occur by their acts, and the statutory agency missions they must fulfill.

Although the Supreme Court of Arizona applied federal law for the Fourth Amendment, it found persuasive the Alaska Supreme Court's reasoning in *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage,* 24 P.3d 547,

557-58 (Alaska 2001) that random versus scheduled tests intrusively infringe upon the privacy rights of the employee. *Petersen,* 207 Ariz. at 39, 83 P.3d at 39. The Supreme Court of Alaska, however, applied Alaska's constitutional provision to the right of privacy, and not the U.S. Fourth Amendment, but in doing so stated that a history of substance abuse problems is not invariably necessary. *Anchorage*, 24 P.3d at 549, 556. Thus, neither the *Anchorage* nor the *Petersen* cases can be used to support Petitioners' contention that the U.S. Fourth Amendment only permits selected versus random testing. (Pt. Br. p 20.) Petitioners' claim that these cases require a showing of a history of drug abuse is not availing. (Pt. Br. pp 14 – 15.)

The Fifth and Tenth Circuit Court of Appeal decisions on the constitutionality of random testing, in the absence of a history of drug abuse, do not conflict. (Pt. Br. pp 15 – 17.) The Fifth Circuit Court of Appeals issued two decisions on random testing of school staff: *United Teachers v. School Bd through Holmes,* 142 F. 3d 853 (5th Cir. 1998) and *Aubrey v. School Board of Lafayette Parish,* 148 F.3d 559 (5th Cir. 1998.) Unlike here, the only issue addressed in *United Teachers, supra,* was whether to enjoin a program automatically testing every employee who incurred a work-related injury no matter who was responsible for the injury. An injunction issued due to the broad reach of the testing and the lack of evidence of a history of drug abuse. Although the question was not before it, the court stated that heavy weight would be given to the special need balance if it related to teachers as role models and to whom children are entrusted. *United Teachers,* 142 F. 3d at 856.

Subsequently, in *Aubrey,* 148 F.3d at 564, the Court of Appeals for the Fifth Circuit approved random testing of a public school custodian because he has access to student and handled dangerous machinery and hazardous substance. Unlike in *United Teachers,* the *Aubrey* panel, 149 F.3d at 563, found evidence to show special interests to warrant such testing and thus, drug abuse or use in the schools, although being

persuasive, was not mandatory. *Id.* Thus, no conflict exists between these two cases: the *United Teachers* panel in the absence of evidence of a special interest, turned for evidence of a history of drug use was proven, while the *Aubrey* panel with substantial evidence of a compelling need, found evidence of drug abuse unnecessary.[4]

Likewise, the Court of Appeals of the Tenth Circuit, in *19 Solid Waste Dep't Mechanics v. City of Albuquerque,* 156 F.3d 1068, 1075-1076 (10th Cir. 1998), struck down random testing of solid waste employees absent facts of a public interest. The court, however, noted that a history of drug abuse was not a prerequisite. Petitioners inaccurately described Judge Briscoe's statements in his concurrence where he stated the absence of any showing of a history of drug abuse "may not always be necessary." *Id.,* 156 F.3d at 1075. (Pt. Br. p 16.) Thus, the Court of Appeals decision below is not in conflict with the Tenth Circuit Court of Appeals.

The Court of Appeals decision below also does not conflict with the decisions out of Colorado, Ohio, or Massachusetts. (Pt. Br. 16, 17, n. 5.) In *Timm v. Reitz*, 39 P.3d 1252, 1256 (Colo. Ct. App. 2001), the Colorado Court of Appeals struck down the random testing of trainers of greyhound dogs due to disputed or insufficient evidence to support the government's asserted rationales. In *Timm,* 39 P.3d at 1258, the court noted that historical evidence of harm or abuse was not mandated. Moreover, it recognized that this Court, in *Von Raab,* 489 U.S. at 674, did not require evidence of a history of abuse where a compelling interest justified the drug testing program.

In *State ex rel Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation,* 97 Ohio St. 3d 504, 512, 780 N.E.2d 971, 990 (2002), *recon. denied*, 98 Ohio St. 3d 1401 (2003), the Ohio

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[4] The dissenting judge in *Aubrey* did not require a drug history, but looked for one after finding the special need asserted was not similar in magnitude to those approved in other cases. *Aubrey*, 148 F.3d at 567, 569-570.

Supreme Court struck down a test program for any employee sustaining work-related injury in Ohio. This decision adheres to this Court's requisite evidence to sustain suspicionless testing: a history of abuse, a unique position, or the potential for creating risks of catastrophe in the workplace. *Id.*

Petitioners relied on *Guiney v. Police Comm'r of Boston,* 411 Mass. 328, 582 N.E.2d 523 (1991) where the Supreme Court of Massachusetts found that in the absence of facts showing a substantial public need the random testing of police and firefighters violated the Massachusetts' Constitution. (Pt. Br. p 17, n. 5.) The court, however, noted its previous ruling that a random testing program for employees who carry firearms or participate in drug interdiction is constitutional under the U.S. Fourth Amendment. *Guiney,* 411 Mass. at 328, 582 N.E.2d at 523 citing to *Guiney v. Roache,* 873 F.2d 1557, 1558 (1st Cir.), *cert. den*ied, 493 U.S. 963 (1989).

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: March 2005

APPENDIX

Opinion of United States District Court,
Docket No. 5:00-CV-21, 2001 U.S. Dist. LEXIS 4560
(March 30, 2001).....1b-15b

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. 5:00-CV-21

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its Affiliated Local 6000,
Plaintiffs,

v

Janine Winters, James Haveman, William Martin, Arthur Ellis, Major General E. Gordon Stump, and Douglas Howard, in their official capacities, jointly and severally,
Defendants.

Decided and Filed: March 30, 2001

OPINION

Before: McKEAGUE, District Judge

Plaintiffs International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its Affiliated Local 6000 (collectively referred to as "UAW"), are labor organizations. In this action, they represent certain State of Michigan employees allegedly affected by random drug and alcohol testing requirements imposed by the Michigan Civil Service [*2] Commission in the 1999-2001 collective bargaining contract between the UAW and the Office of the State Employer. In their four-count first amended complaint, asserting civil rights claims under *42*

U.S.C. 42 U.S.C. § 1983, plaintiffs challenge the drug and alcohol testing requirements as violative of employees' Fourth Amendment privacy and Fourteenth Amendment due process rights. Named as defendants are the directors of departments of state government who have authority to implement the subject drug and alcohol testing policies: Janine Winters, Director of the State Employer; James Haveman, Director of the Michigan Department of Community Health; William Martin, Director of the Michigan Department of Corrections; Arthur Ellis, Superintendent of Public Instruction; Major General E. Gordon Stump, Director of the Michigan Department of Military and Veterans Affairs; and Douglas Howard, Director of the Family Independence Agency. Plaintiffs seek declaratory and injunctive relief, as well as attorney fees.

Now before the Court is defendants' motion to dismiss the complaint in its entirety. Defendants contend that plaintiffs lack standing, that there is no ripe case or controversy, [*3] that this Court should abstain, and that, in any event, plaintiffs have failed to state a claim upon which relief can be granted.

I. PLAINTIFFS' COMPLAINT

Article 52, in its present form, was included in the collective bargaining contract by the Michigan Civil Service Commission over the UAW's objection. Article 52 allows the employer to require "test-designated employees" to submit to random drug testing or alcohol testing. Among the seven categories of positions defined as "test-designated positions" are four categories of positions occupied by employees who are represented by plaintiffs:

....

> (2) A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.

> (3) A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.
>
> (4) A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.
>
> (5) A position in which the incumbent has unsupervised access to controlled substances.
>
> ....

Collective [*4] Bargaining Contract, Art. 52, § 1(g). Since random testing was implemented on March 1, 2000, until August 22, 2000, when plaintiffs' first amended complaint was filed, plaintiffs allege 235 UAW-represented employees had been subjected to a random drug test or alcohol test. In count one of the complaint, plaintiffs allege the random, suspicionless drug and alcohol tests constitute unreasonable searches and seizures in violation of Fourth Amendment privacy rights.

Section 5 of Article 52 provides that a positive alcohol test indicating a breath alcohol concentration equal to or greater than 0.02 shall constitute just cause for the employer to discipline an employee. Although plaintiffs have not alleged that any represented employee has been subject to discipline under this provision, they alleged in count two that the threat of discipline constitutes an unreasonable search and seizure and deprives represented employees of property without due process.

In count three, plaintiffs challenge the "reasonable suspicion testing" provision of Article 52, § 3. It requires employees "to

submit to a drug test or an alcohol test if there is reasonable suspicion that the employee has violated [*5] this article." Plaintiffs contend "reasonable suspicion" is defined so broadly or vaguely as to allow supervisor abuse and harassment of disfavored employees. n1 Again, plaintiffs do not allege that any represented employee has been subject to unfair treatment, or any discipline at all, under the reasonable suspicion provision. Yet, they allege the threat of enforcement infringes their Fourth Amendment privacy rights.

n1 Reasonable suspicion" is defined in § 1(e) of Article 52 as follows:

> Reasonable suspicion means a belief, drawn from specific objective facts and reasonable inferences drawn from those facts in light of experience, that an employee is using or may have used drugs or alcohol in violation of a departmental work rule or a civil service rule or regulation. By way of example only, reasonable suspicion may be based upon any of the following:
>
> (1) Observable phenomena, such as direct observation of drug or alcohol use or the physical symptoms or manifestations of being impaired by, or under the influence of, a drug or alcohol.
>
> (2) A report of on-duty or sufficiently recent off-duty drug or alcohol use provided by a credible source.
>
> (3) Evidence that an individual has tampered with a drug test or alcohol test during employment with the State of Michigan.

> (4) Evidence that an employee is involved in the use, possession, sale, solicitation, or transfer of drugs or alcohol while on duty, while on the employer's premises, or while operating the employer's vehicle, machinery, or equipment.

[*6]

Count four is addressed to "follow-up testing" requirements under § 3(a)(3) of Article 52:

> Follow-up testing. An employee shall submit to an unscheduled follow-up drug test or alcohol test if, within the previous 24-month period, the employee voluntarily disclosed drug or alcohol problems, entered into or completed a rehabilitation program for drug or alcohol abuse, failed or refused a Preappointment drug test, or was disciplined for violating this rule.

Plaintiffs allege the threat of enforcement of such onerous follow-up testing violates represented employees' Fourth Amendment privacy rights and deprives them of property without due process.

II. REPRESENTATIONAL STANDING

In moving to dismiss the complaint, defendants first challenge the UAW's standing to enforce personal civil rights under *42 U.S.C. § 1983.* This issue is controlled by *Knox County Educ. Association v. Knox County Bd. of Educ., 158 F.3d 361, 379 n.24 (6th Cir. 1998),* where the Sixth Circuit observed that " [HN1] a union does have representational standing to challenge the constitutionality of an alcohol and drug testing policy on behalf of its members." Accordingly, [*7] the Court rejects defendants' standing argument.

III. SUBJECT MATTER JURISDICTION

A. Ripeness

Even if plaintiffs might be deemed to generally have representational standing to invoke the Court's jurisdiction, defendants contend the Court lacks subject matter jurisdiction over the claims asserted in counts two, three and four because they are not "ripe." In counts two, three and four, plaintiffs complain of the "threat" posed by Article 52 discipline, reasonable suspicion, and follow-up testing provisions. Because plaintiffs have failed to name any represented employee who has actually been subject to discipline or testing under any of these provisions, defendants contend the UAW's claims are premature.

The UAW's representational standing "does not eliminate or attenuate the constitutional requirement of a case or controversy." *Warth v. Seldin, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).* In order to satisfy the case or controversy requirement, the UAW "must allege that its members, or any one of them, are suffering *immediate or threatened injury* as a result of the challenged action of the sort that would make out a justiciable case had **[*8]** the members themselves brought suit." *Id. at 511* (emphasis added). If a claim is not ripe for review, then there is no actual case or controversy and the Court lacks subject matter jurisdiction. *Dixie Fuel Co. v. Comm'r of Social Security, 171 F.3d 1052, 1057 (6th Cir. 1999); Bigelow v. Michigan Dep't of Natural Resources, 970 F.2d 154, 157 (6th Cir. 1992).* Ripeness requires that the injury in fact be "certainly impending." *National Rifle Ass'n of America v. Magaw, 132 F.3d 272, 280 (6th Cir. 1997).* "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *Id.*

The Supreme Court defined the purpose of the ripeness doctrine as follows:

> Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties. The problem is best **[*9]** seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). See also Dixie Fuel, 171 F.3d at 1057 (stating that the ripeness determination requires consideration of fitness for judicial decision and hardship to the challenging party).

In response to defendants' ripeness challenge, plaintiffs have failed to demonstrate that the claims asserted in counts two and three are ripe. n2 In connection with count two, plaintiffs have not alleged that any represented employee has been subject to discipline, unfair or otherwise, for having had a breath alcohol concentration equal to or grater than 0.02. Absent the imposition of some sort of discipline, plaintiffs are unable to allege an actual injury cognizable as a violation of privacy or due process rights. The mere possibility of discipline is insufficient to render the claim justiciable -- especially where the nature of the discipline that might be imposed is left to the discretion of the employer. **[*10]** Only when the nature of the infraction and the discipline are defined can the reasonableness of any resulting invasion of privacy or deprivation of property be evaluated. In other words, until discipline is imposed, there is no injury in fact that poses a claim fit for judicial decision. Neither can the mere threat, the hypothetical possibility, that unreasonable discipline *might* be imposed for a technical violation of the 0.02 standard be deemed to result in the sort of

hardship to plaintiffs' members as might render the count two claim justiciable.

> n2 Plaintiffs' response to the ripeness challenge is limited to their count one claim, as they argue that random drug and alcohol testing has commenced and is presently infringing members' privacy rights. Defendants do not contest the ripeness of count one.

The same analysis applies with equal force to plaintiffs' count three claim challenging the "reasonable suspicion testing" authorized by Article 52. The mere possibility that a supervisor may abuse the discretion **[*11]** inherent in determining the reasonableness of suspicion -- despite the limitations imposed by the Article 52 definition of reasonable suspicion, and despite the additional requirements that reasonable suspicion testing be first documented and approved by the drug and alcohol testing coordinator (see Article 52, § 3(b)(4)) -- is insufficient to confer ripeness. Absent an alleged instance of enforcement and an actual injury (in the form of an allegedly unreasonable search), plaintiffs' count three claim fails to satisfy both the "fitness" and the "hardship" elements of ripeness.

Count four challenges the Article 52 follow-up testing provision. This provision requires any covered employee -- not just those in test-designated positions -- to submit to unscheduled drug or alcohol testing (not more than six times per year) for a period of two years after any of the following occurrences: (a) the employee's voluntary disclosure of drug or alcohol problems; (b) the employee's entry into or completion of a drug or alcohol abuse rehabilitation program; (c) the employee's failure or refusal to submit to a preappointment drug test (a prerequisite to appointment to a test-designated position); **[*12]** or (d) the employee's having been disciplined for violating any provision of Article 52.

This provision is undisputedly in effect currently, although plaintiffs have failed to name any represented employee specifically impacted by it. It purports, on its face, to apply

automatically on the occurrence of any one of the listed events. That is, its requirement that the employee submit to unscheduled drug and alcohol testing is not triggered by or otherwise dependant on the exercise of the employer's discretion. Plaintiffs' count four claim, to the extent it rests on Fourth Amendment privacy interests, thus presents a "cleaner" legal question which appears not to require a fuller factual development than is now available to enable fair and effective judicial review. Moreover, inasmuch as the present threat of follow-up testing may work to deter represented employees from addressing their drug or alcohol problems in a rehabilitation program, it may pose hardship if judicial review is denied. For these reasons, the Court concludes that plaintiffs' count four claim for violation of Fourth Amendment privacy rights is ripe and does present an actual case or controversy.

The same cannot be **[*13]** said, however, of the count four due process claim. This claim has not been well defined. Plaintiffs appear to assert a protected property interest in continued employment. To the extent that discharge from employment represents a *potential* penalty for violation of the follow-up testing requirement, plaintiffs apparently allege that its enforcement threatens their members with loss of employment under circumstances that *could* constitute a denial of procedural and/or substantive due process. This mere possibility of discharge under improper circumstances, clearly, is not an actual injury, but a hypothetical one. No injury in fact is "certainly impending." It follows that plaintiffs' count four due process claim is not justiciable.

In sum, then, only the claims contained in counts one and four, asserting privacy interests, survive defendants' ripeness challenge. The claims contained in counts two, three and four, to the extent count four asserts a due process claim, will be dismissed for lack of a justiciable case or controversy.

B. *Rooker-Feldman* Doctrine

Defendants also contend the Court lacks jurisdiction over this matter under the *Rooker-Feldman* Doctrine. **[*14]** The

Rooker-Feldman Doctrine is the product of two Supreme Court decisions, *Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923),* and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983).* These rulings [HN4] combine principles of abstention and res judicata and stand for the proposition that the inferior federal courts lack jurisdiction to review a state court decision of an adjudicatory nature. *United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995).* A party raising a federal question already litigated in state court must appeal the state court decision through the state system and then directly to the United States Supreme Court. *Id.*

Here, defendants have not identified any prior state court decision or proceeding that is implicated by plaintiffs' claims. Defendants' creative efforts to cast the Civil Service Commission's adoption of Article 52 as a state court proceeding or as being adjudicatory in nature are unavailing. The Civil Service Commission's adoption and imposition of the Article 52 clearly represents the discharge of an administrative function. **[*15]** Therefore, *Rooker-Feldman* does not bar this Court's review of the instant claims.

IV. ABSTENTION

Defendants also ask the Court to abstain from exercising jurisdiction for prudential reasons. First, they contend the Court should abstain under *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971),* and its progeny. [HN5] Pursuant to *Younger*, and succeeding cases, it is generally recognized that federal courts must, out of comity and federalism concerns, refrain from enjoining pending state criminal proceedings, as well as pending state civil or administrative proceedings in which important state interests are involved. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 626-28, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986).* *Younger* abstention has never been extended, however, to encompass state proceedings that are not "judicial in nature." *New Orleans Public Service, Inc. v. Council of City of New*

Orleans, 491 U.S. 350, 369-70, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989).

Younger abstention has no application in the present case, because again, defendants have not identified any *pending* **[*16]** state proceeding of a judicial nature. The mere fact that plaintiffs might have sought state judicial review of the Civil Service Commission's administrative action does not foreclose federal court review of plaintiffs' § 1983 claims. *See Ohio Civil Rights Comm'n, 477 U.S. at 627 n.2.*

Defendants next contend the Court should abstain pursuant to *Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943).* [HN6] The Supreme Court has defined the applicability of *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, 491 U.S. at 361, quoting **[*17]** *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976).*

Here, it appears that plaintiffs could have sought state court review of the Civil Service Commission's action. However, no questions of state law are implicated by plaintiffs' § 1983 claims. Neither does the Civil Service Commission's regulation of the conditions of state employment pose the sort of complex regulatory scheme governing distinctively local concerns that would warrant abstention. " [HN7] While *Burford* abstention is concerned with protecting complex state administrative

processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *New Orleans Public Service, 491 U.S. at 362.* Clearly, the constitutionality of the Article 52 drug and alcohol testing provisions can be assessed without unduly disrupting state efforts to establish a coherent policy. [HN8] Abstention is not required "merely because resolution of a federal question may result in the overturning of a state policy." *Id. at 363,* **[*18]** quoting *Zablocki v. Redhail, 434 U.S. 374, 380 n.5, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978).*

Accordingly, defendants' request that the Court abstain from exercising jurisdiction is denied.

V. VALIDITY OF CLAIMS

Defendants contend plaintiffs' complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6).* [HN9] Defendants' motion under Rule 12(b)(6) tests the legal sufficiency of the complaint. The Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiffs. *Forest v. United States Postal Service, 97 F.3d 137, 139 (6th Cir. 1996).* The Court is not, however, required to accept summary allegations or unwarranted legal conclusions. *Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999).* Dismissal is appropriate only if it appears beyond doubt that plaintiffs can prove no set of facts consistent with their allegations that would entitle them to relief. *Id.*

The parties acknowledge that the viability of plaintiffs' Fourth Amendment claims is determined with reference to the Supreme Court's ruling in *Chandler v. Miller, 520 U.S. 305, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1997).* **[*19]** In *Chandler,* the court recognized that [HN10] drug and alcohol testing of employees "intrudes upon expectations of privacy that society has long recognized as reasonable." *Id. at 313,* quoting *Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617, 103 L.*

Ed. 2d 639, 109 S. Ct. 1402 (1989). Government-ordered intrusions of this type are "searches" under the Fourth Amendment and must therefore be "reasonable" to satisfy constitutional muster. *Chandler, 520 U.S. at 313.* Ordinarily, such searches must be based on individualized suspecion of wrongdoing to be reasonable. *Id.* However, particularized exceptions have been recognized based on "special needs, beyond the normal need of law enforcement." *Id.*, quoting *Skinner, 489 U.S. at 619.*

Defendants contend the drug and alcohol testing required under Article 52 is justified by such "special needs." Defendants argue that suspicionless random testing is authorized on a carefully tailored basis only for test-designated positions, the duties of which pose significant health and safety concerns (i.e., employees who are required or permitted to carry a firearm; employees **[*20]** who provide direct health care to persons in the care or custody of the state; employees who have regular unsupervised contact with prisoners, probationers or parolees; and employees who have unsupervised access to controlled substances); and for employees with a documented history of drug or alcohol problems or drug or alcohol testing problems.

Defendants' proffered "special needs" may ultimately be deemed to justify the testing authorized by Article 52, but they do not warrant dismissal of plaintiffs' surviving claims at this stage. [HN11] As the Supreme Court has recently made clear, it is not for the Court to "simply accept the state's invocation of a 'special need.'" *Ferguson v. City of Charleston, 528 U.S. 1187, 120 S. Ct. 1263, 146 L. Ed. 2d 98, 2001 WL 273220* *6 (U.S. 2001). Rather, the Court must undertake a "close review" of the scheme at issue and "all available evidence," *id.* at *6-7, to determine whether the proffered special need is "substantial -- important enough to override the individual's acknowledged privacy interest." *Chandler, 520 U.S. at 318.* The Court "must undertake a context-specific inquiry, examining closely the competing private and **[*21]** public interests advanced by the

parties." *Id. at 314. See also Knox County Education Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 373 (6th Cir. 1998).*

In deciding defendants' Rule 12(b)(6) motion, the Court assesses the facial sufficiency of the complaint and views the allegations in the light most favorable to the plaintiffs. Evaluating plaintiffs' allegations under the standards established in *Chandler*, the Court can hardly hold that plaintiffs can prove no set of facts consistent with their allegations that would entitle them to relief. Defendants' Rule 12(b)(6) motion is simply not the appropriate vehicle for evaluating the constitutionality of Article 52 as a matter of law. The Court can undertake the required context-specific inquiry, closely examining the competing private and public interests involved, only after the record has been developed. Then, defendants' motion can be renewed as one for summary judgment under *Fed. R. Civ. P.56.*

Accordingly, defendants' motion to dismiss plaintiffs' remaining Fourth Amendment claims for failure to state a valid claim will be denied. An order consistent with this opinion shall issue forthwith. **[*22]**

Dated: March 30, 2001

DAVID W. McKEAGUE

UNITED STATES DISTRICT JUDGE

ORDER OF PARTIAL DISMISSAL

In accordance with the Court's written opinion of even date,

IT IS HEREBY ORDERED that defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part; and

IT IS FURTHER ORDERED that the claims asserted in counts two and three of plaintiffs' first amended complaint, as well as the claim for deprivation of property without due process asserted in count four, are **DISMISSED** for lack of justiciability; and

IT IS FURTHER ORDERED that defendants' motion to dismiss is, with respect to the Fourth Amendment claims asserted in counts one and four, **DENIED**.

Dated: March 30, 2001

DAVID W. McKEAGUE

UNITED STATES DISTRICT JUDGE

(3)

No. 04-1009

IN THE

Supreme Court of the United States

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its affiliated LOCAL 6000,

Petitioners,

v.

DAVID FINK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF

STATEMENT OF THE CASE

The Respondents are now requiring more than one fourth of the 61,000 employees of the State of Michigan to submit to random urine tests for drugs and alcohol as a condition of their continued employment (Resp. Br., 17). As the Sixth Circuit found, however, there is no evidence of a significant level of drug use by the State's civil servants or of any significant work problems actually arising from such use (Pet, 13a).

For purposes of opposing this petition, however, the State Respondents have attempted to obscure those facts by asserting that there have been "instances" where probation officers have tested positive for drugs and other instances where em-

ployees were found in possession of drugs on the grounds of the State prisons or community health facilities (Resp. Br., 8, 12). But the State has stipulated that those instances are extremely rare. For the professional and clerical employees represented by the UAW, the State stipulated that:

> 140. In the last ten years, no employee represented by the UAW has been accused of smuggling controlled substances to any prisoner in the Michigan correctional facilities.
>
> 141. In the last ten years, one employee represented by the UAW has been found in possession of controlled substances within the Michigan correctional facilities.
>
> (Amend. Stip., paras 140-141, Ct App Jt Apx, 119).

Similarly, for health-care employees in the UAW units, the State stipulated that:

> 158. Before February 12, 2001, no employee represented by the UAW in any position designated for testing under Category 3 [delivery of health care services] has ever been accused of delivering health care services while impaired due to drug or alcohol use. On February 12, 2001, an incumbent in a Registered Nurse position in Kalamazoo Psychiatric Hospital tested positive for marijuana use following a random drug screen.
>
> (Amend Stip., para 158, Ct App Jt Apx, 122).

More generally, the State stipulated that in the 39,000 drug tests that it conducted, .8 percent of employees tested positive for marijuana and .17 percent tested positive for any other substance (Amend Stip., paras 26-30, Ct App Jt Apx, 91-92).

The State respondents, however, assert that the tests should be sustained because there remains some risk, however slight, that a drug-impaired employee could cause harm in the future. For Customs Agents, air traffic controllers, pilots and similar jobs where a single error could have grave conse-

quences, this Court and the lower courts have upheld testing on such a basis. But for the broad range of jobs where the harm that could be caused by an error is much lower, the lower courts have split over whether random testing may be sustained on the basis offered here.

The question at issue here is whether a far broader class of employees, comprising in this case over a fourth of the workforce of the State of Michigan,[1] may be required to undergo repeated random tests based on harms that can be envisioned but that have not in fact occurred.

REASONS FOR GRANTING THE WRIT

I. THE RESPONDENTS HAVE WRONGLY ATTEMPTED TO PAPER OVER THE SPLIT IN THE LOWER COURTS OVER THE CIRCUMSTANCES IN WHICH THE GOVERNMENT MAY REQUIRE ITS EMPLOYEES TO UNDERGO RANDOM DRUG TESTS IN THE ABSENCE OF ANY EVIDENCE THAT THERE IS A SIGNIFICANT LEVEL OF DRUG USE AMONG THOSE DESIGNATED FOR TESTING.

In repeated decisions, the state supreme courts and the federal courts of appeals have found that there was little evidence of drug use by public employees upon whom the

---

[1] The Respondents attempt to style this a facial challenge because the Petitioner stipulated that the particular jobs at issue fell within one or more of the categories that the State had designated for testing. (Resp. Br., 15-16). From the beginning, however, the Petitioner challenged the testing program as it applied to the *job classifications* at issue in this case. Indeed, the parties attached the classification specifications and entered into extended stipulations on the numbers of employees in the classifications in various work sites and the experience of drug use that existed in the various classifications. As both the Sixth Circuit and the district court understood that the UAW challenged the State's program as it applied to these particular classifications, the State's claim that this case presents a facial challenge has no basis at all.

government had imposed random drug testing. *Peterson v City of Mesa*, 207 Ariz 35, 39, 83 P. 3d 35 (2004), *cert. den.* ___U.S.___, 125 S. Ct. 51 (2004)(firefighters); *United Teachers v School Bd through Holmes*, 142 F. 3d 853, 856 (5th Cir. 1998)(teachers); *19 Solid Waste Department Mechanics v City of Albquerque*, 156 F. 3d 1068, 1074 (10th Cir. 1998) (mechanics); *Knox County Education Association v Knox County Board of Education*, 158 F. 3d 361, 374 (6th Cir. 1998), *cert. den.* 528 U.S. 812 (1999)(teachers); *Aubrey v School Board of Lafayette Parish*, 148 F. 3d 559, 563 (5th Cir. 1998)(custodians); *International Union, UAW v Winters* (Pet App, 1a-16a)(civil servants).

After agreeing on those factual findings, however, the courts have split dramatically over whether the government may force such employees to submit to random drug tests. In the absence of evidence of a work-related drug problem, appellate courts have struck down the random testing of firefighters in Arizona, *Peterson*, of teachers in Louisiana, *United Teachers*, and of mechanics in New Mexico, *19 Solid Waste Mechanics*. On essentially identical factual records, however, other appellate courts have sustained the random testing of teachers in Tennessee, *Knox County*, school custodians in Louisiana, *Aubrey*, and, now, civil servants in Michigan, *International Union, UAW*.

The Respondents attempt to attribute this split to claimed factual differences between the cases (Resp. Br., at 27-29). But a mere listing of the job classifications reveals that the jobs at issue are similar in their duties, in the degree of supervision, and in the risk of harm that they pose. Moreover, even a brief review of the actual decisions demonstrates that the appellate courts have split over the law—and in particular over their understanding of this Court's decisions in *National Treasury Employees Union v Von Raab*, 489 U.S. 656 (1989), *Chandler v Miller*, 520 U.S. 305 (1997), and *Board of Education v Earls*, 536 U.S. 822 (2002).

The Respondents, for example, claim that the Supreme Court of Arizona in *Peterson* and the Sixth Circuit in this case reached different results because firefighters have more supervision, do not carry firearms, do not participate in the interdiction of drug shipments, and do not work in a "highly regulated industry or profession" (Resp. Br., at 27). But those asserted distinctions do not exist: the professional and clerical employees working in the Michigan's hospitals and prisons have *more* supervision than firefighters; they, too, do not carry firearms; with the partial exception of parole and probation officers, they have no greater role in interdicting illegal drugs than do firefighters; and their professions are no more regulated than those of firefighters.

More fundamentally, the opinions of the Supreme Court of Arizona and of the Sixth Circuit make clear that they differ not over the facts—but over the law. Thus, the Supreme Court of Arizona held that *Von Raab* had to be read in its "unique context" of Customs Agents, while the Sixth Circuit explicitly held that *Von Raab* applied to many "unique" contexts. Compare *Petersen*, 82 P.3d at 40, with *International Union, UAW* (Pet Apx, 12-13a). Similarly, the Supreme Court of Arizona held that *Earls* provided only "limited support" for the random testing of firefighters because they had "little in common with students entrusted to the government's care," *Peterson*, 82 P 3d at 40. The Sixth Circuit, however, cited *Earls* repeatedly in support of the broad proposition that "the need to deter and prevent a substantial harm provides the necessary immediacy for the imposition of a drug testing program." *International Union, UAW*, Pet 12-13a.

The Respondents' attempts to conceal the legal differences that split the Fifth Circuit are similarly unavailing. Even though the conflict is obvious, the Respondents assert that there is no conflict between an August 1998 panel decision upholding the random testing of school custodians and a May

1998 panel decision striking down the random testing of teachers, because, say the Respondents, in the three months between May and August 1998 the Fifth Circuit discovered a special need for protecting children in the public schools (Resp. Br., at 28-29, citing *Aubrey, supra,* and *United Teachers, supra.*).

But both *United Teachers* and *Aubrey* explicitly recognized that there was a special need to protect school children. The *United Teachers* panel, however, held that a school district could *not* establish that drug testing was required to address that need without proof of an "identified problem in drug use by teachers." The *Aubrey* panel, however, held that a school district *could* establish that drug testing was required to address the same proffered special need in the absence of any evidence of drug use by custodians. Compare *United Teachers*, 142 F. 3d at 857, with *Aubrey*, 148 F. 3d at 563-564. As Judge Dennis demonstrated in dissent, the two Fifth Circuit panels had sharply divergent understandings of this Court's decisions in *Von Raab* and *Chandler*. *Aubrey*, 142 F. 3d at 570-571 (Dennis, J, dissenting).

The same split is evident in the Tenth Circuit's decision in *19 Solid Waste Mechanics*. Even though the Respondents correctly observe that all of the judges in that case agreed that random tests could sometimes be justified in the absence of proof of a preexisting drug problem (Resp. Br., at 29), they ignore the sharp disagreement between the judges over the circumstances in which that could be done. Writing for the majority, Judge Tacha read *Von Raab* and *Chandler* broadly, declaring that they allowed the government to impose random tests on mechanics even in the absence of a "documented drug problem among mechanics." *Id.*, 156 F. 3d at 1074. In dissent, however, Judge Briscoe held that *Chandler* required that *Von Raab* be read "in its unique context" and that random tests could not be imposed upon mechanics ". . . in the

absence of a demonstrated problem of drug abuse." *Id.*, 156 F. 3d at 1075.

In fact, the Respondents' own brief—and in particular its expansive reading of *Earls*—makes clear the need for a definitive decision by this Court. In *Earls*, both Justice Thomas and Justice Breyer stated that this Court upheld the program at issue *because* it was a (1) voluntary, (2) non-disciplinary program for (3) testing high-school students—a group for whom the state had in loco parentis responsibilities and among whom there was national evidence of high levels of drug use, including high levels of the use of "hard" drugs. *Earls*, 536 U.S. at 830, 833-834, 839-843. The Sixth Circuit disregarded all three of these *explicit* limitations (*International Union, UAW*, Pet 13a, citing *Earls*, 536 U.S. at 836). The Respondents now go even further by asserting that in general the government need not wait for "a major accident" or "evidence of massive drug use" before subjecting one fourth of its employees to random testing (Resp. Br., 23, citing *Earls*, 536 U.S. at 836).

The issue is one that must be resolved. If, as the Sixth Circuit held and the Respondents contend, the State "need not wait" if it can imagine a harm that a drug-impaired employee could cause, then drug testing can expand from a quarter to a half of State employees—and to many professionals whose jobs are regulated by the State. If, on the other hand, the Supreme Court of Arizona, the *United Teachers* panel, and Judge Briscoe correctly understood this Court's precedents, then the State cannot expand the testing to far broader categories of employees without evidence that there is an actual problem of drug abuse among those employees.

As millions of public employees—and more millions of professionals regulated by the State—work where there is no significant drug problem, the question at issue is of obvious importance. Moreover, as the government is "the potent, Omnipresent teacher," the issue is important even beyond the

realm of those working for or regulated by the government. See *Chandler*, 520 U.S. at 322, quoting *Olmstead v United States*, 277 U.S. 438, 485 (1928)(Brandeis, J, dissenting).

II. THE RESPONDENTS HAVE WRONGLY ASSERTED THAT THERE IS A SETTLED OR OBVIOUS SPECIAL NEED FOR TESTING THE POSITIONS AT ISSUE HERE.

The bulk of Respondents' Brief is devoted to establishing the purported need for testing the employees at issue—and a claimed consensus in favor of that testing. While much of that discussion is irrelevant at this time, four points are essential.

First, there is no consensus in the lower courts that the positions at issue here should be subject to testing (Resp. Br., 19-23). As to the counselors, psychologists and social workers in the State hospitals—and the probation and parole officers in the State correctional system—the State has cited *no* decision from *any* jurisdiction in the country upholding the testing of such persons. Even as to the employees who work inside the prisons, the precedent cited by the State is decidedly split: the Seventh Circuit has approved the testing of all employees who have contact with the inmates, but the Ninth Circuit has upheld testing only of correctional officers and stated that even there, "the call was close" even before this Court's limitation of *Von Raab* in *Chandler*. See *Taylor v O'Grady*, 888 F 2d 1189 (7th Cir 1989); *American Federation of Government Employees v Roberts*, 9 F. 3d 1464, 1468 (9th Cir. 1993).

Second, despite the Respondents' suggestions to the contrary, the fact that the employees at issue concededly work in jobs where privacy is already diminished does not by itself establish a special need for the testing (Resp. Br., 19-20). In fact, it may establish the reverse. Thus, for example, while the State clearly has an interest in stopping the importation of

unlawful drugs into the prisons, the unrelenting scrutiny and repeated searches of prison employees already provides near draconian means to detect and deter that trade. Indeed, if an employee is willing to brave repeated searches, constant scrutiny, and long prison terms in order to import drugs into the prison, an occasional drug screen will obviously provide little, if any, additional deterrent, even for those would-be importers who happen to use drugs themselves.

Third, despite the Respondents' suggestions to the contrary (Resp's Br, 6-7), the fact that the probation, parole, and prison employees work with clients who have high rates of past or present drug use is *not* grounds for testing those employees. As this Court should make clear, a special need—like guilt—may not be established by association.

Fourth, the mere invocation of the possibility of shakedowns does not establish a special need for drug testing (Resp's Br, 7). In fact, it establishes the need for the searching analysis that this Court commanded in *Chandler* and that is so noticeably absent in the lower court opinions in this case. Of course, *if* a prisoner, parolee, or probationer *happened* by *some means* to discover that an employee was engaged in some illegal activity in his *off-duty* time, that *might* lead to a shakedown by *some* of those offenders. But the qualifiers indicate how rare that contingency is in theory—and the data indicate that it is to date unknown in Michigan.

The fact is that the public officials who order drug tests can envision limitless ways in which drug use on the job might cause harm and can claim that drug testing may deter some of those harms. The question is whether and under what circumstances the incremental deterrent of those imagined harms is sufficient to impose random searches on thousands of innocent employees.

The Petitioners ask this Court to resolve that question.

CONCLUSION

For the reasons stated, the petitioners request that this Court grant the writ of certiorari to the Sixth Circuit.

Respectfully submitted,

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